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Exclusion clauses of the Refugee Convention in relation to national immigration legislations, European policy and human rights instruments

Article 1F versus the *non-refoulement* principle

Zarif Yakut-Bahtiyar

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Article 1F versus the *non-refoulement* principle

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Having spent the last two years of my studies abroad, I began to think about all kinds of job options open to me after my graduation except the one I accepted. At the beginning of 2007, I started working as a researcher within the Deprivation of Freedom Research Group at Tilburg University. It was Anton van Kalmthout who offered me the job and, at that time I started to work, I could not have predicted that the next step in the very beginning of my academic career would be to write a research proposal funded by an NWO grant. It was again Anton who proposed for me to write a PhD thesis. In view of my interest in immigration law, it was fairly obvious that my thesis would concern a topic in this field. After several discussions, Anton and I agreed to choose Article 1F of the Refugee Convention, which was a very topical subject at the time.

It is clear that Anton has been influential in the making of this book and I am most grateful to him. To be honest, this has not always been the case especially at times when I was struggling and wondering what I had let myself in for. There is something about Anton that makes you like him. Perhaps it is his charismatic appearance, his down-to-earth and open mindedness and his will to always help others in any way he can. In my particular case, he is also the man who showed incredible confidence in me and gave me complete freedom to do as I wanted. Anton, thank you for giving me this opportunity. I am very proud of having you as my supervisor.

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Tilburg, March 2016

Abbreviations

ACVZ	Adviescommissie voor Vreemdelingenzaken
AI on Exclusion	Asylum Instruction on Exclusion
AI on RL	Asylum Instruction on Restricted Leave
AIT	Asylum and Immigration Tribunal
AMIF	Asylum, Migration and Integration Fund
ATCS Act 2001	Anti-terrorism, Crime and Security Act 2001
CAT	UN Convention against Torture
CDDH	Steering Committee for Human Rights
CEAS	Common European Asylum System
CEFR	Common European Framework of Reference for Languages
CIREA	Centre for Information, Discussion and Exchange on Asylum
CoA	Court of Appeal
CoE	Council of Europe
COI	Country of Origin Information
CPP	Communist Party of the Philippines
CPT	Committee for the Prevention of Torture
DBS	Disclosure and Barring Service
DG	Directorate-General
DL	Discretionary Leave
DT&V	Dienst Terugkeer en Vertrek
EASO	European Asylum Support Office
EC	European Commission
ECHR	European Convention on Human Rights
EComHR	European Commission of Human Rights
ECRE	European Council for Refugees and Exiles
ECSR	European Committee of Social Rights
ECtHR	European Court on Human Rights
ECJ	European Court of Justice
EHRC	European Human Rights Cases
EU	European Union
FAVON	Federatie van Afghaanse Vluchtelingen Organisaties in Nederland
IA 2014	Immigration Act 2014
IA 1971	Immigration Act 1971
IAA 1999	Immigration and Asylum Act 1999
IAN 2006	Immigration, Asylum and Nationality Act 2006
ICC	International Criminal Court

ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal of Rwanda
ICTY	International Criminal Tribunal of Yugoslavia
IND	Immigratie en Naturalisatiedienst
INDIS	Immigration and Naturalisation Service Information System
IR	Immigration Rules
IRO	International Refugee Organisation
ISI	Inter-Services Intelligence
JV	Jurisprudentie Vreemdelingenrecht
KhAD/WAD	Khadimat-e Atal'at-e Dowlati/Wazarat-e Amaniat-e Dowlati
NIAA 2002	Nationality, Immigration and Asylum Act 2002
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
NJCM	Nederlands Juristen Comité voor de Mensenrechten
NPA	New People's Army
RL	Restricted Leave
RSD	Refugee Status Determination
RV	Rechtspraak Vreemdelingen
RvdW	Rechtspraak van de Week
SIS	Special Immigration Status
SIAC	Special Immigration Appeals Commission
SIACA 1997	Special Immigration Appeals Commission Act 1997
SC	Supreme Court
SCIFA	Strategic Committee on Frontiers, Immigration and Asylum
TEC	Treaty on the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
USA	United States of America
USZ	Uitspraken Sociale Zekerheid

Chapter 1 Introduction

§ 1.1 What is this study about?

Though the practice of asylum has existed for a very long time and the right to asylum has already been laid down in the Universal Declaration of Human Rights, the Convention relating to the Status of Refugees (Refugee Convention), which is referred to as the 'Magna Carta for Refugees' is the key legal document for defining a refugee, their rights, the legal obligations of states and the major legal foundation on which the United Nations High Commissioner for Refugees' (UNHCR) work is based.[1] The object and purpose of the Refugee Convention consists in the protection of those who meet the refugee definition contained in Article 1A which states that the person must have a:

'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.

Besides explaining who can claim protection, the Convention also defines who it does not cover. The exclusion clauses under Article 1F are designed to exclude from protection, persons with respect to whom there are serious reasons for considering that they have committed:

a) a crime against peace, a war crime or a crime against humanity;
b) a serious non-political crime prior to being recognised as a refugee;
c) or has been guilty of an act contrary to the purposes and principles of the UN.

The overall aim of the exclusion clauses are to deny protection to those who allegedly have committed certain acts that are considered so serious that the perpetrators are undeserving of international protection as refugees. The pre-war international instruments that defined various categories of refugees contained no provisions for the exclusion of criminals. It was after the Second World War that for the first time special provisions were drawn

[1] The Convention is signed on 28 July 1951 and entered into force on 22 April 1954.

up to exclude certain persons who were considered unworthy of international protection. At the time when the Refugee Convention was drafted, the memory of the trials of major war criminals was still very much alive, and there was agreement on the part of states that war criminals should not be protected. There was also a desire on the part of states to deny admission to their territories criminals who would present a danger to security and public order.[2] According to the UNHCR Background Note on the Application of the Exclusion Clauses (UNHCR Background Note), Article 1F must be viewed in the context of the overriding humanitarian objective of the Refugee Convention. Hence, exclusion has to be limited to offences which exceed a certain high threshold of egregiousness and should apply where the criminal aspect of a case including, in particular, the nature of the circumstances and the character of the offender are so dominant that awarding the privileged label of 'refugee' to the offender would risk distorting the humanitarian image and essential objectives of asylum.[3]
Article 1F has a relatively wide group of addressees as it excludes not only those actually prosecuted for certain crimes and acts but also anyone who there are 'serious reasons for considering' the same. The standard of proof required under Article 1F is thus less than the standard required in criminal proceedings ('beyond reasonable doubt') but more than mere suspicion. Clear and credible evidence is required to meet the 'serious reasons for considering' threshold. The grounds in Article 1F are enumerated exhaustively and the competence to decide whether a person falls within Article 1F lies with the state in whose territory the asylum seeker seeks recognition as a refugee. These are subject to interpretation, but cannot be supplemented by additional criteria in the absence of an international convention to that effect. In view of the possible consequences of exclusion, which implicate that an excludable person may not be issued with a Convention Travel Document or any other kind of certificate describing him as a refugee in the sense of the Refugee Convention, the exclusion clauses must always be interpreted restrictively and should be used with great caution.[4]

Though an excluded asylum seeker does qualify for protection under the Refugee Convention, exclusion from a refugee status does not entail disqualification from all forms of protection under national and international law. This means

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2 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Geneva, HCR/1P/4/Eng/Rev.2,1979. A revised edition of the Handbook is published in 1992 and the latest reissue dates from 2011. See Part 1, paras. 147-148 - <http://www.unhcr.org/3d58e13b4.html> (last accessed on 25 September 2015).

3 UNHCR Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees. Protection Policy and Legal Advice Section, Department of International Protection, Geneva 4 September 2003.

4 Idem, p. 503.

that the excluded asylum seeker may still be able to turn for protection to relevant national and international instruments. It is, therefore, important to maintain a clear differentiation between refugee protection and other types of human rights protection. Protection against *refoulement* is an example of the latter. Though exclusion of an asylum seeker basically leads to the expulsion of the person from the country, this may be impossible to execute due to legal obstacles such as the *non-refoulement* principle. Pursuant to this principle, no person should be returned to any country where there is a risk that their life would be in danger or of their being subjected to torture. Several human rights instruments[5] contain such a rule, but it is undisputed that aliens residing in European countries very often refer to Article 3 ECHR which prohibits torture and inhuman or degrading treatment or punishment. The European Court of Human Rights (ECtHR) has repeatedly affirmed that the protection under Article 3 is absolute and must prevail, even under difficult circumstances such as the fight against terrorism and organised crimes or even in times of public emergency. The protection afforded by Article 3 is thus wider than that provided by Article 33 of the Refugee Convention as according to Article 33 (2), the *refoulement* principle may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is or who, having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of that country.[6] In these situations, the alien is still protected by Article 3 ECHR. While the prohibition of *refoulement* may provide the individual with a right to stay, it does not, like the Refugee Convention, entail the right to a regulated status.

§ 1.2 Reasons for research and the research question

The European Council, at its special meeting in Tampere in 1999, agreed to work towards establishing a Common European Asylum System (CEAS) based on the full and inclusive application of the Refugee Convention. The basic layout of the CEAS, as defined in the Tampere Programme[7] and confirmed by the Hague Programme[8], consists in the establishment of a common asylum procedure and a uniform status valid through the EU. Several legislative

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5 Such as Article 3 of the UN Convention against Torture; Article 7 of the International Covenant on Civil and Political Rights; Article 4 of the EU Charter of Fundamental Rights and also regional refugee instruments such as the Bangkok Principles and the 1969 Convention on the Specific Aspects of Refugee Problems in Africa.

6 Under the Convention, Articles 1F and 33 (2) serve different purposes, as the first one deals with the exclusion clauses, while the latter is concerned with the treatment of persons who are deemed refugees, but who nonetheless may be removed under the Convention. More details on Article 33 (2) can be found in Chapter 3.

7 <http://www.europarl.europa.eu/summits/tam_en.htm> (last accessed on 21 September 2015).

8 <http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/l16002_en.htm> (last accessed on 21 September 2015).

measures have been introduced to 'achieve both a higher common standard of protection and greater equality in protection across the EU and to ensure a higher degree of solidarity between EU Member States'. A key document adopted by the Council of the EU is the Qualification Directive. In this Directive, the exclusion clauses under Article 1F of the Refugee Convention are included as a central feature in the eligibility test for protection under the CEAS. Though the EU is making efforts to create uniformity within Europe regarding asylum, a relevant question remaining unresolved relates to the status and treatment of 1F applicants. Already in 2001, the European Commission called for an urgent need of further examination and eventual resolution at European level regarding the issue of excludable but non-removable persons.[9] To this day, not much has changed in Europe with regard to the group of 1F applicants as Member States have their own policies and deal differently with several aspects related to the issue of Article 1F. I will try to clarify this situation on the basis of the following example case:

> *Mr X fled in 2004 from Turkey and applied for asylum in the Netherlands. Based on the account of his reasons for his request for asylum, the Dutch authorities suspect the applicant to have committed crimes which might fall under the exclusion clauses of Article 1F of the Refugee Convention and start further investigations about him. Documents submitted by Mr X and official country reports from Foreign Affairs and the General Intelligence and Security Service show that Mr X became a member of the Kurdish Hezbollah in 1990. It turns out that he made rapid progress within the organisation, joined the militant wing of the organisation and took over responsibility for seven provinces in East-Turkey. In 1992, he ordered the liquidation of a teacher and participated in actions which lead to inflicting grievous bodily harm on another teacher. Mr X went into hiding during conflicts involving the Turkish government and the Hezbollah in 1998 after which he managed to flee to the Netherlands. On the basis of the available information, the Immigration and Naturalisation Service decides in 2006 to apply Article 1F to the applicant and thus reject his claim to asylum. In such a situation, it assessed whether Article 3 of the European Convention on Human Rights (ECHR) forms an obstacle for the applicant's removal to his country of origin. Mr X, who succeeded in bringing forward sufficient evidence to prove his removal would put him at risk of torture or inhuman or degrading treatment or punishment is not removed to Turkey. In accordance with Dutch policy, a non-removable excluded asylum seeker is not given a legal stay either. Mr X is left in limbo for many years with no perspective for any change in his situation.*

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[9] Commission Working Document, *The relationship between safeguarding internal security and complying with international protection obligations and instruments* COM/2001/0743 final.

In the case of Mr X, the Dutch authorities found that there were serious reasons to consider that he had committed a 1F-crime, and decided to exclude him from protection. Once an exclusion decision has been taken, the person in question is no longer entitled to other forms of legal residence in the Netherlands, even when Article 3 ECHR forms an obstacle for removal. This means in concrete that the 1F applicant cannot work and is not entitled to social benefits which results in far-reaching social, psychological and legal consequences for the person concerned, his family and for the society as a whole.[10] It is likely that if Mr X had fled to another European country instead of the Netherlands, he would have not been excluded from protection and he would have been issued with a residence permit. The results of a Strategic Committee on Frontiers, Immigration and Asylum (SCIFA) questionnaire on Article 1F, which was distributed among EU Member States, shows that the Netherlands carries out a more proactive 1F-policy within Europe because most of the EU countries rarely apply the exclusion clauses.[11] The reason why other countries do not use the exclusion clauses often can be that they are less attentive to it during the Refugee Status Determination (RSD) procedure or they do not have enough expertise on the matter. It can also be because there is no consensus on the status to be granted to excludable but non-removable persons. As stated above, Article 3 ECHR prohibits removal, but does not entail a right to legal stay.[12] This matter falls entirely within the prerogatives domain of states. This way, the Netherlands does not allow residence permits to be issued to those persons falling within this category. In case Mr X had fled to the United Kingdom (UK) instead of the Netherlands and indeed been excluded under Article 1F, he would still have been given a legal residence as the UK grants Restricted Leave to those who are excluded but cannot be removed. Those under this leave can claim certain rights which may be restricted by the authorities.

The European aspect is of growing importance because of the increasing power of the European Courts and legislative institutions, combined with the process of European integration and harmonisation. In this research the European perspective is furthermore reflected in the jurisdictions that are studied in detail on a national level, namely the Netherlands and the UK. These countries are interesting to study because their post-exclusion phase is different as turns out from the example of Mr X, but there are more reasons which make their scrutiny worthwhile.[13] As stated above, the Netherlands

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10 See Reijven & Van Wijk 2012, pp. 26-30 and 2014, pp. 259-263.

11 Several states filled in the questionnaire with the reservation of confidentiality therefore only rough data are published. *House of Representatives* (*Kamerstukken II*) 2006/07, 30 800 VI, No. 123.

12 Larsaeus 2004, pp. 69-97.

13 Post-exclusion means: the period after an alien is indeed excluded from refugee protection under Article 1F of the Refugee Convention.

are within Europe at the forefront of applying Article 1F of the Refugee Convention. A great deal of the 1F-policy in the Netherlands has actually been developed with respect to the group of former KhAD/WAD members who are collectively assumed to fall under Article 1F.[14] The exclusion of these Afghan men is based on a Dutch official report from 2000 which is still being criticized for its correctness. To this day, the authorities stand firm and is a change not in sight.
The UK is a special case within the EU as it has included a Special Immigration Status (SIS) in the Criminal Justice and Immigration Act 2008, which relates to foreign criminals and their dependants (including those who are excluded under Article 1F) whom it cannot remove from the country because to do so would breach their human rights. Though the 2008 Act is named Criminal Justice and Immigration Act, part 10 of the Act which deals with the SIS is the only part concerning immigration which to date is not in force and most likely will not be.

The central question of this research is as follows:

Which solutions can be formulated on a national and European level to deal with the dilemmas surrounding 1F applicants who cannot be removed?

§ 1.3 Structure of the study

A lot has already been written about the exclusion clauses in the literature. Nevertheless, publications on the topic deal to a large extent with the definition of the three clauses of Article 1F. A study on the provision, including an in-depth focus on the post-exclusion phase from a European perspective is, as yet, sorely lacking. The description of the applicable law as it stands, its theoretical framework and comparative elements of this research fill up this gap and contribute to the debate regarding the possibilities and limits of developing a Common European Asylum System and make this research valuable to legal practice.

On the basis of the following sub-questions I will attempt to provide an answer to the central research question as stated above.

What is the rationale behind Article 1F of the Refugee Convention and how should it be applied?

Chapter 2 provides an introduction to Article 1F of the Refugee Convention and discusses the exclusion clauses within the framework of UNHCR's

[14] The abbreviations KhAD/WAD stand for Khadimat-e Atalát-e Dowlati and Wazarat-e Amaniat-e Dowlati, which were Afghanistan's intelligence services during the communist government (1978-1992).

documents on the matter. This chapter comprises three parts: a historical and substantive analysis of the exclusion clauses and a focus on procedural aspects related to exclusion.
After an overview on the history of development of the Refugee Convention, attention is paid to the question why the drafters of the Convention found it necessary to exclude protection to persons who have been involved in criminal activities. Further, this chapter will discuss the negotiation and drafting process of Article 1F and examine the three clauses under this provision. It will also look into which crimes fall under these limbs. It falls outside the scope of this study to provide a thorough study of the latter, but it is indeed relevant to have a good understanding of how the exclusion clauses should be interpreted. The last part of the chapter concerns the exclusion process within the Refugee Status Determination procedure.

What does the EU asylum acquis state about the exclusion clauses?

The EU's aim of creating a Common European Asylum System has led to the adoption of secondary legislation within the area of immigration and asylum law. Chapter 3 deals with EU asylum law with a focus on the four main asylum Directives which have been adopted during the first phase of the CEAS and implemented in the EU Member States. These are the Temporary Protection Directive, Reception Conditions Directive, Qualification Directive and the Directive on Asylum Procedures. These Directives and also the already adopted recasts of the last three mentioned Directives will be studied to explore what they state with regard to the exclusion clauses and aspects relating to exclusion, such as *refoulement* and detention. The original text of the Directives and the recasts are discussed. However, the revised version of the relevant provisions serve as a starting point for this study. In addition to the mentioned Directive's which include specific provisions relating to exclusion, also other instruments such as the Returns Directive and EU Charter of Fundamental Rights will be examined. Up to now, several cases have been handled by the European Court of Justice (ECJ) regarding the exclusion clauses of the EU asylum Directives. These will also be examined.

What is the role of the ECHR for asylum seekers who have been denied on the basis of Article 1F?

Exclusion under Article 1F makes an alien ineligible for a refugee status under the Refugee Convention and Qualification Directive, but it does not prohibit states from providing 'another kind of protection'. The latter is often based on the rights and freedoms as laid down in the ECHR. Though the Convention is relevant for all asylum seekers, Chapter 4 will particularly deal with the relevant provisions of the ECHR which are related to the application

of the exclusion clauses. Article 3 plays a central role in this study and will be discussed first. The other provisions which will be treated are: Article 8 on the right to family life, Article 5 (1) (f) concerning the right to liberty and security and Article 13 regarding the right to have an effective remedy before a national authority. Finally, ECtHR case law concerning excluded asylum seekers will be examined. The Strasbourg Court plays a significant role in monitoring compliance with the Convention as its judgments are binding upon states.[15]

How do the Netherlands and the UK deal with the application of Article 1F in their national legislation and case law?

After outlining the exclusion clauses and *refoulement* as reflected in UNHCR and European documents and case law, Chapters 5 and 6 elaborate upon the question how the Netherlands and the UK deal with Article 1F, in particular with regard to non-removable 1F applicants in the post-exclusion phase. Article 1F has been and still is the subject of discussion and debate in these two jurisdictions and both countries have their own backgrounds and point of view on the matter. Furthermore, the study will discuss the current legislation, practice and development and the influence of particular cases on the policy towards excluded asylum seekers who are unremovable.

In Chapter 7, a comparison is made based on the findings of the two countries on relevant aspects relating to exclusion to see the similarities and differences and the way they deal with the issue. The aspects to be discussed are the assessment of exclusion, the post-exclusion phase and the role of Article 8 ECHR.
The main findings are summarised in the conclusions of very chapter. These will be used in the synthesis of Chapter 8 which will provide an answer to the central research question.

For the sake of clarity, the term 'exclusion clauses' used throughout the study only refers to the clauses as laid down under Article 1F of the Refugee Convention. This way, 'exclusion clauses' and 'Article 1F' can be seen as synonyms.

§ 1.4 Methodology

The overall objective of this study is to cover historical and comparative aspects and also discuss the European view based on the traditional methods used in legal research including relevant legislation, literature and case law. A variety of sources have been consulted such as legislation and legislative history, policy and other government/parliamentary legal documents,

[15] Article 46 (1) ECHR.

reports from international organisations and NGOs and case law from national and international bodies.[16]

Literature search
To present the topic in a framework, it was necessary to study existing academic and theoretical literature on the issue of Article 1F. For this purpose, several handbooks, commentaries and articles in the field of international refugee law were consulted including related sources in the UK and the Netherlands. My objective has been to provide a complete overview on the available material regarding the exclusion clauses and their contextual aspects according to prevailing ideas, but also any deviations from the rule. I have also described, analysed and commented on my findings.

Legislative analysis
The *travaux preparatoires* to the Convention proved valuable for the discussion in Chapter 2 dealing, *inter alia*, with the historical development of the Refugee Convention. Additionally, commentaries to the Refugee Convention and its Protocol have been consulted. With regard to Chapter 3 on EU asylum law, the commentaries from Hailbronner, Peers and others in which the relevant Directives receive ample treatment have been consulted. As regards the jurisdictions of the two countries involved, I undertook an in-depth analysis of the national legislation, including the Explanatory Memoranda to the national Acts resulting in good insights into the relevant legislation.

Legal documents
Besides literature and legislation, diverse documents at international/European and national level on the exclusion clauses and, in particular, relating to the issue of the unremovable excluded asylum seekers are examined. Among these are UNHCR documents, EU Green Paper on the CEAS, reports by Amnesty International and European Council on Refugees and Exiles. Regarding the Netherlands and the UK, attention is also paid to national policy documents from the Ministries concerned.

Case law
Exploring the available jurisprudence on Article 1F is an important aspect of the study as judgments may clarify certain matters and some principles related to the exclusion clauses developed by courts. Where possible, reference is made to relevant judgments concerning the exclusion clauses, at the European level to the ECtHR and ECJ, but also from courts outside Europe. At the national level consideration is given to the extensive case law on Article 1F in the Netherlands and in the UK.

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[16] The academic literature, legislation and jurisprudence are current as of September 2015.

Interviews

In addition to the 'traditional methods' used in legal research as expressed in the foregoing, interviews were held. These were beneficial to the study as they make clear whether the gathered data is reliable. In addition, face-to-face research interviews give one the chance to gather valid data concerning the practice in certain issues which are otherwise difficult to find in the literature. For the chapter on the UK, I interviewed and maintained several follow-up contacts with an expert from the Home Office's Special Cases Unit. This unit is, amongst others, responsible for handling 1F cases. In the Netherlands discussions were held with excluded asylum seekers, lawyers assisting 1F applicants and staff members from the Immigration and Naturalisation Service which falls under the Ministry of Justice.[17]

[17] Details of these interviews as well as names of the interviewees are on file with the author.

Chapter 2 A focus on Article 1F of the Refugee Convention from UN perspective

§ 2.1 Introduction

To understand what this study is about and to be able to put the following chapters in a right context, requires a good grasp of the matter. That is why this chapter will provide an introduction to Article 1F of the Refugee Convention. The discussion of the provision takes place within the framework of authoritative documents of the UNHCR, which are based on the organisation's supervisory task concerning the Refugee Convention, and provide guidance to Member States with respect to the interpretation and application of the Convention. The chapter starts with the history of the Refugee Convention and the term 'refugee' in particular after which a distinction between a substantive and procedural analysis can be made. The substantive part deals with the rationale behind the exclusion clauses, the drafting proceedings of the clauses which took place at the meetings of the Conference of Plenipotentiaries followed by attention to the interpretation of the clauses, particularly to the question which crimes are covered by Article 1F. The procedural analysis concerns the exclusion process within the Refugee Status Determination procedure. According to the UNHCR, first a person is assessed whether they meet with the definition of a refugee and, if so, a three-step test is followed when there are indications that the person concerned has been involved in excludable acts under Article 1F. Within this discussion, topics such as individual responsibility, family unity and proportionality considerations will be presented followed by a conclusion.

§ 2.2 Adoption of the Refugee Convention

The conflict and political instability during the Second World War led to the enforced migration of huge numbers of people. With the end of this War, the largest population movements in European history took place. The Soviet Union took over the eastern countries of Europe which came under Communist regimes and led to the escape and expulsion of many refugees. The International Refugee Organisation (IRO) which was set up by the United Nations (UN) in 1946, resettled more than one million displaced Europeans around the world and helped 73,000 civilians to return to their former homes. In December 1948, the UN General Assembly adopted the Universal Declaration of Human Rights, of which Article 14 (1) prescribes that 'Everyone has the right to seek and to enjoy in other countries asylum from persecution'. Two years later, in 1950, the United Nations High Commissioner for Refugees (UNHCR) was established which succeeded

the IRO. Though UNHCR was initially established for a period of three years, it still exists and is the only authorised institution dealing with refugee issues.[18] UNHCR's primary responsibility is set out under paragraph 1 of the UNHCR Statute which states that it is to provide 'international protection' to refugees and, by assisting governments, to seek 'permanent solutions for the problem of refugees'.

It was in 1949 that the UN Economic and Social Council appointed an Ad Hoc Committee on Statelessness and Related Problems consisting of 'representatives of thirteen governments, who shall possess special competence in this field' to 'consider the desirability of preparing a revised and consolidated convention relating to the international status of refugees and stateless persons and, if they consider such a course desirable, draft the text of such a convention'.[19] There were already legal instruments available regarding refugees which were still valid at the end of the Second World War.[20] However, they concerned only specific categories of refugees, defined by origin or nationality and were not relevant for refugees during or after the Second World War. The Ad Hoc Committee focused on the refugee and came with a draft of the Refugee Convention. The work and draft Convention of the Ad Hoc Committee was sent to member governments as well as other governments who were invited to give their comments on the report so that this could be submitted to the Economic and Social Council. In its eleventh session, in August 1950, the Council considered the report of the Ad Hoc Committee and comments submitted by various States. It decided to reconvene the Ad Hoc Committee with the purpose of redrafting the Convention in the light of these comments. The report of the second session of the Ad Hoc Committee was transmitted by the Secretary General to the General Assembly.[21] The General Assembly considered the report and decided to convene a Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons in order to redraft the Convention. In July

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18 In December 2003 the General Assembly decided to remove the temporal limitation on the continuation of the UNHCR and to continue the Office 'until the refugee problems is solved'.

19 Einarsen 2011, p. 54.

20 E.g. the Agreement of 1928-1929 between Belgium and France; the Convention Relating to the International Status of Refugees of 1933 and the Convention of 1938 concerning the Status of Refugees coming from Germany- the related Protocol and the Evian Resolution of 14 July 1938. The substantive rights stated by the Refugee Convention originate from two main sources, namely the mentioned 1933 Refugee Convention and the 1948 Universal Declaration of Human Rights.

21 The second Ad Hoc Committee is known as the Ad Hoc Committee on Refugees and Stateless Persons. During the early stages of the discussions including the session of the first Ad Hoc Committee, the problems of refugees and stateless persons were treated together.

1951, the Conference of Plenipotentiaries met and completed the drafting of the Convention. Besides the representatives of the member governments, different NGOs were also present during the treaty process which took approximately five and a-half years.[22]

The Refugee Convention is still the key legal document in refugee law: it defines a refugee, his rights, legal obligations of states and is the major legal foundation of UNHCR's work. The importance of the UNHCR's role is recognised in the Preamble to the Convention, while Article 35 of the Refugee Convention deals with the cooperation of States with UNHCR. The UNHCR Statute which was adopted in December 1950 serves as the institution's constitution and lays down the functions and responsibilities of the High Commissioner.[23] Also the Statute provides a definition of the term 'refugee'.[24] The substance of the definitions in the UNHCR Statute and Refugee Convention are quite similar, but not identical. For a more detailed elaboration of the similarities and differences between the definitions see Grahl-Madsen.[25] According to him, the terms are drawn up for different purposes: paragraph 6 of the Statute sets forth that 'the competence of the High Commissioner shall extend to' the persons satisfying the conditions laid down in this (and the following) paragraphs. Article 1 of the Convention provides that 'for the purposes of the present Convention' the term 'refugee' shall apply to any person who meets the criteria set forth in the said Article, which means that these criteria are decisive for the extent of the duties which the Contracting States have undertaken by acceding to the Convention. Given its various limitations, the Refugee Convention does not cover every refugee, but the competence of the High Commissioner may extend to further categories of persons and apply the provisions of the Convention to other persons than those who fall under the terms of Article 1. Over the years, the General Assembly has given the UNHCR a broader mandate, which includes 'persons of concern to the UNHCR', *inter alia*, stateless and internally displaced persons. The difference in definition makes it possible to recognise a person as both a mandate and a Convention refugee or as a mandate refugee but not as a Convention refugee.[26] According to the *travaux preparatoires* of the Conference of Plenipotentiaries, drafting Article 1 of the Refugee Convention occupied the Conference more than the drafting of any other article, as every aspect of the definition was debated extensively.[27]

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22 Goodwin-Gill 2008.

23 See <http://www.unhcr.org/cgi-bin/texis/vtx/home> (last accessed on 21 September 2015).

24 The term refugee is stated in paragraph 6A of the UNHCR Statute and the exclusion clauses are laid down in paragraph 7 of the Statute.

25 Grahl-Madsen 1966, p.105 et seq.

26 Goodwin-Gill & McAdam 2007, p. 52.

27 The *travaux preparatoires* are the official records concerning the negotiations on the Refugee Convention.

§ 2.3 Definition of a refugee in the Refugee Convention

Article 1A of the Refugee Convention prescribes that the term 'refugee' shall apply to any person who has a:

'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.

The original text of the definition contained the complementary phrase, '*as a result of events occurring before 1 January 1951'* and the option for Contracting States to understand the mentioned phrase as meaning events occurring in Europe or in Europe and elsewhere.[28] These temporal and geographical limitations were initially incorporated because the drafters felt:

'it would be difficult for governments to sign a blank cheque and to undertake obligations towards future refugees, the origin and number of which would be unknown'.[29]

The broadly framed definition with limitations was the adopted middle course in the discussion between states whether to formulate a universal refugee definition or a more casuistic definition based on nationality or origin of refugee groups. According to Einarsen, 'the definition was, contrary to common belief, not influenced much by the Cold War. The new refugees from the East after the Second World War fitted the already well-known category of persecution for reasons of political opinion and it was made sure that this contemporary refugee group would not be left out of treaty protection by the limitations. Some of the deepest divisions were between Western states; it was not a case of the West against the rest'.[30]

Though the original framers of the Refugee Convention did not expect refugee issues to be a major international problem for a long period, the contrary was the case. The refugee crisis spread from Europe to Africa in the

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28 Although governments had the option of adopting a geographical limitation when ratifying the Refugee Convention, only a few did so. Currently, Congo, Madagascar, Monaco and Turkey still apply the geographical limitation to refugees outside of Europe.

29 The UNHCR Statute is of universal application and does not contain a temporal nor geographical limitation.

30 Einarsen 2011, pp. 55-67.

1960's and then to Asia and back to Europe by the 1990s.[31] The emergence of refugee situations outside Europe since 1951 made the international community recognise the universal value of the refugee regime. In 1964, the UNHCR started to consider the possibility of modifying or removing the time limit to secure the relevance of the Refugee Convention with respect to e.g. African refugees.[32] This led to the adoption of the 1967 Protocol relating to the Status of Refugees[33] which lifted the time and geographical limitations and extended the application of the Refugee Convention and the mandate of UNHCR to protect refugees other than those affected by events in Europe at the time of the Second World War.[34]

If we look at the Convention definition of a refugee as previously stated, we can see that the refugee who falls under the definition has to satisfy four elements: he is outside his country of origin; he is unable or unwilling to seek or take advantage of the protection of that country, or to return there; such inability or unwillingness is attributable to a well-founded fear of being persecuted; and the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion.[35]

With regard to the first point, Goodwin-Gill states that 'the fact of having fled, or having crossed an international frontier, is an intrinsic part of the quality of refugee, understood in its ordinary sense' and that 'those who possess more than one nationality will only be considered as refugees within the Refugee Convention if such other nationality or nationalities are ineffective'.[36] According to Grahl-Madsen the phrase 'is outside' includes persons who have fled from their home country as well as those who have become refugees *sur place*. The UNHCR Handbook prescribes that the term 'well-founded fear of being persecuted' contains a subjective and an objective element and that in determining whether it exists, both elements have to be taken into consideration. With respect to the subjective element 'the determination of refugee status primarily requires an evaluation of the applicant's statements rather than a judgment on the situation prevailing in

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31 '50th Anniversary, The wall behind which refugees can shelter. The 1951 Geneva Convention', Refugees Volume 2, No. 123-2001, pp. 12-13.

32 Idem, p. 70.

33 The Protocol relating to the Status of Refugees entered into force on 4 October 1967.

34 Since its adoption, the Refugee Convention has been supplemented by refugee and subsidiary protection regimes in several regions, as well as via the progressive development of international human rights law. See for example, the Organisation of African Unity (now African Union) Convention governing the Specific Aspects of Refugee Problems in Africa 1969 and the 1984 Cartagena Declaration on Refugees in Latin America.

35 Goodwin-Gill & McAdam 2007, p. 135.

36 Goodwin-Gill 2008, p. 3.

his country of origin'. As regards the objective element, 'this implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that his frame of mind must be supported by an objective situation'. The Handbook states further that 'in general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable if he returned there'.[37]

The term 'persecution' is not defined in the Refugee Convention. According to Zimmermann & Mahler, 'persecution' contains two main elements, namely a sufficiently severe human rights violation and a determination regarding the perpetrator of the violation.[38] With regard to the human rights violation, it may be inferred from Articles 31 and 33 that it includes the threat to life, or the threat of torture, or cruel, inhuman or degrading treatment or punishment. Persecution normally concerns action by the authorities of a country. However, where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or of the authorities refuse, or prove unable, to offer effective protection.[39] With respect to the reasons for persecution as stated above, the UNHCR Handbook mentions that it is unimportant whether the persecution arises from one of these reasons or from a combination of two or more; race has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as race in common usage; the term reasons of religion covers various form such as membership of a religious community, personal faith or private worship, participation in or insistence on certain forms of public worship, religiously motivated acts or omissions[40]; nationality covers besides 'citizenship' also membership of an ethnic group; the reason 'membership of a particular social group' includes the previously stated reasons of race, religion or nationality, but is of broader application than the combined notions of racial, ethnic and religious groups. The typical 'political refugee' is set forth as one persecuted by the government of a state or other entity on account of his or her opinions, which are an actual or perceived threat to that government or its institutions, or to the political agenda and aspirations of the entity in question.[41]

Under the Refugee Convention, refugees are not to be penalized for seeking protection, nor to be exposed to risking return to their country of origin.[42]

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37 UNHCR Handbook 2011, Part 1, paras. 37-50.

38 Zimmermann & Mahler 2011, p. 345.

39 UNHCR Handbook 2011, Part 1, paras. 51-65.

40 Grahl-Madsen 1966, p. 218.

41 For a detailed elaboration of the reasons for persecution see Goodwin-Gill & McAdam 2007, pp. 74-90.

42 Article 33 of the Refugee Convention prohibits the expel or return of a refugee in any manner whatsoever to the frontiers of territories where their life or freedom would be

They are entitled to a number of basic survival and dignity rights, as well as to documentation of their status and access to national courts for the enforcement of their rights. Beyond these basic rights, refugees are also guaranteed a more expansive range of civil and socio-economic rights.[43]
Besides prescribing the definition of who is a refugee and what their rights are, the Refugee Convention also explicitly spells out circumstances in which refugee status may be lost or denied. Goodwin-Gill & McAdam state four sets of circumstances in which this is the case: by reasons of voluntary acts of the individual; by reason of change of circumstances; by reason of protection accorded by other states or international agencies and in the case of criminals or other undeserving cases.[44] The scope of this research focuses on the last category, in particular the exclusion clauses as laid down in Article 1F of the Refugee Convention. Before discussing these clauses in detail, the following paragraph deals with several documents on Article 1F published by the UNHCR.

§ 2.4 UNHCR guidance on exclusion

According to the UNHCR's Statute its main tasks are to provide international protection and seek durable solutions for the problems of refugees. What is meant by providing international protection is laid down in paragraph 8 of the Statute which gives a non-exhaustive list of forms of protection, such as assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities and facilitating the co-ordination of the efforts of private organisations concerned with the welfare of refugees.

According to Article 35 of the Refugee Convention, Member States are obliged to cooperate with the UNHCR to enable it to carry out its tasks, particularly its supervisory role. A similar obligation to Article 35 is found in Article II of the 1967 Protocol and in various conclusions of the UNHCR ExCom which recall the obligation of state parties to the Refugee Convention and its 1967 Protocol to cooperate with UNHCR, by facilitating its supervisory task and providing detailed information on the implementation of the Convention and Protocol.[45]
Zieck states that the drafters of the Refugee Convention did not have a clear understanding of what supervision on the part of UNHCR would mean. She explains that 'proceeding from the understanding that 'supervision'

threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. This so-called *non-refoulement* principle will be dealt with extensively later on in Chapter 4.

43 Hathaway 2005, pp. 93-95.

44 Goodwin-Gill & McAdam 2007, p. 135.

45 Zieck 2011, p. 1482.

can be taken as the equivalent of monitoring rule compliance, identifying the meaning and purport of 'supervision' will take recourse to practice, which will proceed from two presumptions: supervision presupposes a clear understanding of the meaning of the various provisions of the Refugee Convention and its 1967 Protocol, on the one hand, and knowledge about actual application on the part of state parties, on the other'.[46] With regard to the first presumption, though UNHCR cannot provide authoritative rulings or opinions on the meaning of terms in the Convention, the organisation has issued various documents, which are regarded to have persuasive authority and provide guidance concerning the interpretation of the provisions of the Refugee Convention and Protocol. These documents are especially relevant as there is in practice no judiciary at the international level that can provide definitive interpretations on the Convention provisions. The Refugee Convention's Article 38 states that disputes between parties to the Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of the parties to the dispute, but this provision is only available to states.[47] As refugees cannot bring a case before the International Court of Justice, they are dependent on national courts and human rights instruments and their monitoring bodies concerning claims for the violation of their rights.

One of the UNHCR documents already mentioned above is the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (UNHCR Handbook) that was published in 1972. The Handbook was based on the knowledge accumulated by the High Commissioner's Office over the years, since the Refugee Convention's entry into force, taking into account practice of States and the literature devoted to the subject. It focuses on the term refugee and on various problems related to the determination of a refugee status. Chapter 4 of the Handbook deals with the exclusion clauses, including Article 1F. Besides the Handbook, the UNHCR has published several other documents on the application of Article 1F in particular, the: *UNHCR Background Note* and the *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*[48] (Guidelines on Exclusion) which were published in 2003. These Guidelines replaced 'The Exclusion Clauses: Guidelines on

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46 Idem, pp. 1494-1495.

47 For more on Article 38, see Oellers-Frahm 2011.

48 'UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees', HCR/GIP/03/05, 4 September 2003.

their Application'[49] and 'Note on the Exclusion Clauses' and give a summary of the key issues relating to the exclusion clauses.[50] The UNHCR Background Note forms an integral part of the Guidelines on Exclusion and provides 'a detailed analysis and review of the exclusion clauses, taking into account, UNHCR Handbook, case law, the *travaux preparatoires* of the relevant international instruments, opinions of academic and expert commentators' and the Second Track of the Global Consultations on International Protection process which examined this subject at its expert meeting in Lisbon, in May 2001'. Besides the general Guidelines on Exclusion, two more Guidelines have been published on specific topics within the framework of Article 1F. These Guidelines concern the application of Article 1F in mass-influx situations[51] and child asylum claims.[52] While the Guidelines on Exclusion and the Background Note also fully apply to exclusion in mass-influx situations, the Guidelines on Exclusion in Mass-Influx Situations pays particular attention to, *inter alia*, operational and legal issues on the arrival of large numbers of asylum seekers across an international border. The latter offers a substantive and procedural guidance on RSD in a child-sensitive manner and on the application of the exclusion clauses to children. With respect to children there is also an Advisory opinion of UNHCR available concerning the exclusion of child soldiers.[53]

The UNHCR ExCom Conclusions on International Protection are also part of the documents that provide guidance on the interpretation of the Refugee Convention and thus on Article 1F. The Executive Committee of the High Commissioner's Programme (ExCom) was established in 1958 and functions as a subsidiary organ of the General Assembly. The functions of ExCom include, *inter alia*, advising the High Commissioner in the exercise of his/her functions and approving proposed biennial budget targets. ExCom has currently 85 members and the Conclusions constitute expressions of opinion which are broadly representative of the views of the international community. They are not formally binding, but as Goodwin-Gill expressed 'they may contribute to the formulation of *opinion juris* by setting out standards of treatment or approaches to interpretation which illustrate a state's sense of legal obligation towards refugees and asylum seekers'.[54]

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49 UNHCR Geneva, 1 December 1996.

50 UNHCR Geneva, 30 May 1997.

51 UNHCR Guidelines on the Application in Mass-Influx Situations of the Exclusion Clauses of Article 1F of the 1951 Convention relating to the Status of Refugees, 7 February 2006.

52 UNHCR Guidelines on International Protection: Child Asylum Claims under Articles 1(A) 2 and 1F of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, HCR/GIP/09/08, 22 December 2009.

53 UNHCR Geneva, 12 September 2005.

54 Goodwin-Gill & McAdam 2007, p. 217.

The UNHCR documents mentioned above deal with several subjects related to the application of Article 1F in Refugee Status Determination procedures. These documents are the most relevant ones regarding the application of Article 1F, but are certainly not a complete list. UNHCR has published a variety of resources within the framework of this provision such as: the Guidance Note on Refugee Claims Relating to Victims of Organised Crimes; Note on the Impact of Security Council Resolution 1624 (2005) on the Application of Exclusion under Article 1F of the 1951 Convention relating to the Status of Refugees; UNHCR Statement on Article 1F[55] and the background paper and summary conclusions from the expert roundtable discussion on exclusion, organised as part of the Global Consultations on International Protection in 2001.

§ 2.5 A substantive analysis of Article 1F

§ 2.5.1 Rationale of the exclusion clauses

The exclusion clauses in Article 1F have to be distinguished from Article 1D and 1E of the Refugee Convention, as the latter two mentioned articles exclude from refugee protection persons whose need for international protection is already addressed under a system other than the refugee regime, or who are entitled to some form of national protection. Contrary to this, the basis for exclusion under Article 1F is the asylum seeker's culpability for grave acts or offences and not the availability of alternative protection.[56]
Article 1D prescribes that the Refugee Convention shall not apply to persons who are receiving protection or assistance from organs or agencies of the UN other than the UNHCR.[57] They may, however, be entitled to the benefits of the Convention in the case that such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the UN. In such circumstances, consideration of exclusion pursuant to Article 1F may arise.[58] This Article involves Palestinians who are refugees as a result of the 1948 or 1967 Arab-Israeli conflicts and who are receiving protection or assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).[59] Article 1E of the Convention is not applicable to a person who is recognised by the

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55 The UNHCR Statement on Article 1F of the 1951 Convention is issued in the context of the ECJ's *Bundesrepublik Deutschland v. B and D* case of 9 November 2010 which will be discussed under § 3.4.2.

56 Nyinah 2000, p. 296.

57 This Article is included in the UNHCR Statute under paragraph 7 (c).

58 UNHCR Background Note, para. 8.

59 For more see 'Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees', UNHCR October 2002.

competent authorities of the country in which he has taken up residence as having the rights and obligations which are attached to the possession of the nationality of that country (paragraph 7 (b) of the UNHCR Statute corresponds with this Article). The UNHCR Handbook[60] defines Article 1E as concerning 'persons who might otherwise qualify for refugee status and who have been received in a country where they have been granted most of the rights normally enjoyed by nationals, but not formal citizenship'.

Article 1F states that the provisions of the Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

a) he [or she] has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
b) he [or she] has committed a serious non-political crime outside the country of refuge prior to his or her admission to that country as a refugee; or
c) he [or she] has been guilty of acts contrary to the purposes and principles of the UN.

The grounds for exclusion in these clauses are enumerated exhaustively and while they are subject to interpretation, they cannot be supplemented by additional criteria in the absence of an international convention to that effect. Paragraph 7 (d) of the UNHCR's Statute contains exclusion clauses which are similar, though not identical, to those prescribed by Article 1F.[61] According to the 'Guidelines on Exclusion' UNHCR officials should be guided by the language of Article 1F as it represents the latter and more specific formulation.

The UNHCR has repeatedly expressed that the exclusion clauses must be applied scrupulously to protect the integrity of the institution of asylum. ExCom Conclusion No. 82 (XLVII), 1997 and other following Conclusions 'reiterated the need to ensure that the integrity of the asylum system is not abused by the extension of refugee protection to those who are not entitled to it and to apply scrupulously the exclusion clauses stipulated in Article 1F of the 1951 Convention and in other relevant international instruments'.[62] This point derives from the purpose of the clauses which is that perpetrators

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60 UNHCR Handbook 2011, Part 1, para. 144. See also 'Note on the Interpretation of Article 1E of the 1951 Convention Relating to the Status of Refugees', UNHCR March 2009.

61 Besides paragraph 7 (d) of the UNHCR's Statute, also Article I (5) of the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa contains exclusion clauses which are most identical to Article 1F of the Refugee Convention.

62 See also ExCom Conclusion No. 103 (LVI) – 2005.

of certain grave acts are undeserving of international protection as refugees. After the Second World War, thus at the time when the Refugee Convention was drafted, it was for the first time that special provisions were drawn up to exclude certain persons from a refugee status as they were considered unworthy of international protection. Another important principle of Article 1F lies in its connection with ideas of humanity, equity and refuge. Thus, the exclusion clause reflect the notion that a person may not claim a benefit or a privilege if she or he has violated some basic standard of lawful behaviour. If perpetrators of grave offences were not excluded from refugee status, the practice of international protection would be in conflict with human rights and humanitarian law standards and would, in some cases, contradict the humanitarian and peaceful nature of the concept of asylum. A further rationale of the Article is that the refugee framework should not stand in the way of serious criminals facing justice.
Nyinah states that:

'it would seem appropriate to consider Article 1F as a component of the network of norms which seek to sanction serious violations, inasmuch as denying the cover of refugee protection to a suspect potentially exposes him to prosecutorial investigation and action. However, this does not mean that the exclusion clauses are intended to perform a penal function in the sense of directly initiating instigating legal proceedings against the excluded individual. This function was not envisaged by the drafters and RSD procedures lack the capacity of performing the role of criminal process. Moreover, a penal function would ultimately threaten or destroy the confidence which asylum seekers should have in asylum protection if the system of international protection is to function effectively'.[63]

According to the UNHCR, exclusion has to be limited to offences which exceed a certain high threshold of egregiousness and should apply where the criminal aspect of a case including, in particular, the nature of the circumstances and the character of the offender which are so dominant that awarding the privileged label of 'refugee' to the offender would risk distorting the humanitarian image and essential objectives of asylum. It was the notorious cases which the drafters of the Convention had in mind.
From this perspective, the exclusion clauses must always be interpreted restrictively and should be used with great caution. In cases of ambiguity the narrower, stricter sense which favours non-exclusion has to be preferred.[64] A restrictive approach is particularly warranted in view of the serious possible consequences of exclusion for the individual, which implicates that an excludable person may not be issued with a Convention travel document

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63 Nyinah 2000, p. 298.
64 UNHCR Background Note, para. 4.

or any other kind of certificate describing him as a refugee in the sense of the Refugee Convention, and that he should not be referred as a Convention 'refugee'. Though beyond this, any state is free to grant any person any rights and benefits it wants to bestow on him, this being a matter entirely within its domestic domain. Though the Convention does not impose rules on further action on excluded persons, the main goal of states is the removal of the person. However, exclusion does not always lead to expulsion as the *non-refoulement* principle is often at stake, which entitles the person to protection based on relevant international law.[65] In view of the particular circumstances and vulnerabilities of children, the UNHCR documents state that the application of exclusion clauses to children always needs to be exercised with great caution.

§ 2.5.2 The historical context of Article 1F

The draft 1951 Convention, as adopted by the first Ad Hoc Committee stated the current Article 1F of the Refugee Convention as follows:

'No Contracting State shall apply the benefits of this Convention to any person who in its opinion has committed a crime specified in Article VI of the London Charter of the International Military Tribunal or any other act contrary to the purposes and principles of the Charter of the UN'.[66]

The London Charter of the International Military Tribunal was the decree issued on August 8, 1945, that laid down the laws and procedures by which the Nuremberg Trials were to be conducted. These were a series of military tribunals, held by the main victorious Allied forces of the Second World War, most notable for the prosecution of prominent members of the political, military, and economic leadership of the defeated Nazi Germany. Article 6 of the London Charter defined three categories of crimes, namely: war crimes, crimes against peace and crimes against humanity. According to Hathaway & Harvey, the general incentive for the elaboration of Article 1F of the Refugee Convention was a determination to give legal force to Article 14 (2) of the Universal Declaration of Human Rights, which states that the right to asylum 'may not be invoked in the case of prosecutions genuinely

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65 Kapferer 2000, pp. 218-219.

66 The Economic and Social Council adopted Resolution E/1818 in which the exclusion provisions of the refugee definition were revised into: No Contracting State shall apply the benefits of this Convention to any person who in its opinion has committed a crime specified in article VI of the London Charter of the International Military Tribunal. No Contracting State shall be obliged, under the provisions of this Convention, to grant refugee status to any person whom it has serious reasons to consider as falling under the provisions of Article 14 (2) of the Universal Declaration of Human Rights.

arising from non-political crimes or from acts contrary to the purposes and principles of the UN'. Thus, an early formulation of Article 1F already prescribed that 'no person to whom Article 14 (2) of the above-mentioned Declaration is applicable shall be recognised as a refugee'. Article 1F was phrased in mandatory terms and although a government may invoke its sovereignty to admit a person described in Article 1F to its territory, it is absolutely barred from granting refugee status to that person'.[67]

The basis for the discussions of the Conference of Plenipotentiaries was formed by the report of the Ad Hoc Committee on Refugees and Stateless Persons which prescribed the following definition:

'The provisions of the present Convention shall not apply to any person with respect to whom there are serious reasons for considering that (a) he has committed a crime specified in Article VI of the London Charter of the International Military Tribunal; or (b) he falls under the provisions of Article 14 (2) of the Universal Declaration of Human Rights'.[68]

At the 19th meeting of the Conference, the Federal Republic of Germany submitted an amendment with regard to clause (a), in which the representative suggested a reference to the appropriate provisions of the 1949 Geneva Conventions instead of the London Charter of the International Military Tribunal:

'By associating the Geneva Conventions with the work of the Conference the humanitarian aims which should govern the Convention would be stressed'…

'The Federal Government of Germany fully agreed that all war criminals should be excluded from the benefits of the Convention, but it could not subscribe to an express reference to the Charter of the International Military Tribunal'...[69]

The representative of the Consultative Council of Jewish Organisations argued strongly against deletion of the reference to the London Charter on the ground that its principles had since been twice confirmed by the General Assembly and formulated by the International Law Commission. He stated

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67 Hathaway & Harvey 2001, p. 263.

68 A/Conf.2/1., Conference of the Plenipotentiaries on the Status of Refugees and Stateless Persons, 12 March 1951.

69 A/Conf.2/SR.19, p.26 Conference of the Plenipotentiaries on the Status of Refugees and Stateless Persons, 26 November 1951. The German proposal can be found in UN doc. A.Conf.2/76.

that neither the Geneva Conventions nor the UN Genocide Convention had the same 'solid foundation'[70] to which the Federal Republic of Germany replied that the objective would be as well met by a provision excluding anyone who had committed non-political crimes or acts contrary to the purposes and principles of the UN.[71] The issue was referred to a working group, which replaced the phrase 'he has committed a crime specified in Article 6 of the London Charter of the International Military Tribunal' with 'he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes', and was eventually adopted by 20 votes to 1 against, with 2 abstentions.[72] This exclusion clause is to be found under current Article 1F (a) of the Refugee Convention.

With respect to clause (b) which has its roots in extraditable crimes and Article 14 (2) of the Universal Declaration of Human Rights, the UK submitted alternative amendments.[73] The representative argued, *inter alia*, that:

'the Declaration only dealt with principles and ideals and was as such not an instrument to which reference could satisfactorily be made in a legal text'.

The representative of the Netherlands stated its support to the UK and found the reference to the Universal Declaration of Human Rights to be inappropriate.[74] The representative from Yugoslavia delivered the text for the second part of the exclusion clause which he thought to be generally acceptable as follows:

b) he has committed a serious crime under common law outside the country of reception; or
c) he has committed an act contrary to the purposes and principles of the UN.

The amendment embraced two concepts: that of crimes committed outside the receiving country; and that of crimes committed by persons who had not at the time acquired the status of refugee.

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70 A/Conf.2/SR.21, p. 7-11, Conference of the Plenipotentiaries on the Status of Refugees and Stateless Persons, 26 November 1951.
71 A/Conf.2/SR.24, p. 6-18, Conference of the Plenipotentiaries on the Status of Refugees and Stateless Persons, 27 November 1951.
72 A. Conf.2/SR.29, p. 9-10, Conference of the Plenipotentiaries on the Status of Refugees and Stateless Persons, 28 November 1951.
73 A/Conf.2/74, Conference of the Plenipotentiaries on the Status of Refugees and Stateless Persons.
74 A/Conf.2/SR.29, p. 11-12, Conference of the Plenipotentiaries on the Status of Refugees and Stateless Persons, 28 November 1951.

The Belgian representative proposed the following version for clause (b) of the Yugoslavian amendment:

'that he has committed a serious crime under common law outside the receiving country before being admitted to it as a refugee'.

Clause (b) of the revised Yugoslav amendment as recast by the representative was eventually adopted by 22 votes to none, with 2 abstentions.[75] In the final text of the Refugee Convention, clause (b) is placed under Article 1F (b) and reads as: 'he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee'. According to Hathaway & Harvey:[76]

'the travaux suggest two distinct, but closely related rationales for Article 1F (b). For some countries, the primary concern was to avoid the admission as refugees of persons who could not be tried for their offences in the asylum state. For others, the goal was to honor extradition obligations despite intervening claims to refugee status. Proponents of both perspectives agreed that because of the gravity of peremptory exclusion, only crimes generally recognised as truly serious should be grounds for exclusion. The net result is a consensus on the substantive ambit of Article 1F (b) defined by three criteria: only crimes committed outside the adjudicating state are relevant, those crimes must be justiciable, and the crimes must meet a fairly exacting definition of gravity. In other words, the drafters' differing perspectives on the primary purpose of Article 1F (b) did not prevent them for arriving at a clearly defined standard for the preemptory exclusion of certain common criminals'.

The remaining clause (c) of the Yugoslav amendment which is the current Article 1F (c) was adopted by 22 votes to none, with 2 abstentions.[77] Grahl-Madsen explains that the records show that the representatives of the countries who made efforts for the inclusion of the clause had only vague ideas of the meaning of the phrase 'acts contrary to the purpose and principles of the UN' as the opinions varied on the interpretation. Thus, the French delegate said that the 'provision was not aimed at the man-in-the-street, but at persons occupying government posts, such as heads of states, ministers and high officials'. According to the delegate of the UK 'it was difficult to define what acts were contrary to the purposes and principles of

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75 Idem, pp. 20-26

76 Hathaway & Harvey 2001, p. 278.

77 A. Conf.2/SR.29, p. 27, Conference of the Plenipotentiaries on the Status of Refugees and Stateless Persons, 28 November 1951.

the UN, though he presumed that what it meant was such acts as war crimes, genocide and the subversion or overthrow of democratic regimes'. He states that:

'Considering the great divergence between these interpretations, it is easily understandable that the Social Committee of the Economic and Social Council expressed genuine concern, feeling that the provision was so vague as to be open to abuse. It seems that agreement was reached on the understanding that the phrase should be interpreted very strictly'.[78]

§ 2.5.3 The interpretation of the exclusion clauses

§ 2.5.3.1 Article 1F (a)

By mentioning crimes against peace, war crimes or crimes against humanity, the Refugee Convention refers generally to international instruments drawn up to make provision in respect of such crimes. There are several instruments dating from the end of the Second World War up until the present that define the notion of 'crimes against peace, war crimes and crimes against humanity' and may be used for the interpretation of this exclusion clause.[79] These are, *inter alia*, the London Charter, the four 1949 Geneva Conventions for the Protection of Victims of War and the Additional Protocols of 1977, the 1948 Genocide Convention, the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, the 1984 Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, the Statutes of the International Criminal Tribunal of Yugoslavia (ICTY) and the International Criminal Tribunal of Rwanda (ICTR) and the Statute of the International Criminal Court (ICC). Contrary to other ad hoc international criminal tribunals, such as the International Military Tribunal, the ICC is a permanent court exercising jurisdiction over the crimes of genocide, crimes against humanity and war crimes committed by individuals. Boot states that the idea of establishing a permanent international criminal court is not new, but that until the early 1990s, it appeared impossible to overcome the differences of opinion between states. According to her, the establishment of the ad hoc Criminal Tribunals of the former Yugoslavia and Rwanda significantly contributed to discussions about a permanent court and this way, the Statutes and case law of these Tribunals influenced the contents of the Rome Statute which was adopted in 1998.[80] In addition to the instruments mentioned, there are several other binding and non-binding instruments which can be referred to regarding the crimes

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78 Grahl-Madsen 1966, p. 283.
79 UNHCR Handbook 2011, Part 1, para. 150.
80 Boot 2002, pp. 3-4.

covered by Article 1F (a). The UNHCR Background Note states that clause (a) allows for a dynamic interpretation of the relevant crimes so as to take into account developments in international law. Though other instruments must also be given due consideration, the Statute and jurisprudence of the ICC can be seen as the main sources for the interpretation of these crimes.[81] As many asylum seekers will have been involved with acts of violence which do not meet this high standard of the crimes under clause (a), Article 1F (a) answers only a fairly small part of asylum-state concerns.[82] Given the extensive writing and authoritative commentary on the international crimes under clause (a), only a brief overview will be provided.[83]

Crimes against peace

This term was first defined in Article 6 of the London Charter and it remains the only international instrument containing a definition. The Charter prescribes that crimes against peace arise from the 'planning, preparation, initiation or the waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment for any of the foregoing'. The crime of aggression is listed as one of the core crimes under the ICC's jurisdiction (Article 5 of the ICC Statute). However, the Court remained unable to exercise jurisdiction over this crime as the Statute did not define the crime. Article 5 (2) of the Rome Statute stated that:

'The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the UN'.

On 11 June 2010, the Review Conference of the Rome Statute adopted by consensus amendments to the Rome Statute[84] which includes a definition of the crime of aggression and a regime establishing how the Court will exercise its jurisdiction over this crime.[85] The conditions for entry into force decided upon at the meeting in Kampala provide that the ICC will not be able to exercise its jurisdiction over the crime until after 1 January 2017 when a decision is to be made by State Parties to activate the jurisdiction. With

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81 UNHCR Background Note 2003, para. 25.

82 Hathaway & Harvey 2001, p. 266.

83 See Boot 2002 for a detailed overview concerning the crimes which ought to fall under clause (a) of Article 1F.

84 The Review Conference of Rome Statute was held in Kampala, Uganda between 31 May and 11 June 2010 and the amendments were adopted in Resolution RC/Res.6.

85 The text of articles 15 *bis* and *ter* set out the conditions for the Court's exercise of jurisdiction over the crime of aggression.

the amendments, Article 5 (2) is deleted and Article 8 bis inserted. The first paragraph of the latter Article defines the individual crime of aggression as: 'the planning, preparation, initiation of execution by a person in a leadership position of an act of aggression'. This paragraph also contains the threshold requirement that the act of aggression must constitute a manifest violation of the Charter of the UN. An act of aggression is defined as 'the use of armed force by one state against another state without the justification of self-defence or authorisation by the Security Council'. The definition of the crime of aggression, as well as the actions qualifying as acts of aggression contained in the amendments (for example invasion by armed forces, bombardment and blockade), are influenced by the UN General Assembly Resolution 3314 (XXIX) of 14 December 1974.[86] Crimes against peace can only be committed in the context of planning or waging of a war or armed conflict and as wars or armed conflicts are only waged by states or state-like entities, a crime against peace can only be committed by individuals in a high position of authority representing a state or state-like entity.[87]

War crimes[88]

Article 6 of the London Charter defined war crimes as violations of laws or customs of war, including 'murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, town or villages, or devastation not justified by military necessity'. As there have been many legal developments since the adoption of the Refugee Convention, several additional instruments have to be considered for the interpretation of the term 'war crimes' today.[89] These crimes can be committed by or perpetrated against civilian as well as military persons. Although war crimes were originally considered to arise only in the context of an international armed conflict, it is now generally accepted that they may be committed in non-international armed conflicts as well.[90] Article 8 of the ICC Statute makes a differentiation between acts constituting war crimes in the context of an international armed conflict and those arising in non-international armed conflict. Internal disturbances and tensions, such as riots and other sporadic acts of violence are not considered to be a non-international armed conflict (Article 8 (2) (d) of the ICC Statute).

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86 See, *inter alia*, Grzebyk 2014 and McDougall 2013 for more on the crime of aggression. <http://www.iccnow.org/?mod=aggression> (last accessed on 21 September 2015).

87 UNHCR Background Note, para. 28.

88 For an outline on the notion of 'war crimes' see Pejic 2000.

89 In addition to the London Charter these are the Geneva Conventions and the 1977 Additional Protocols, the jurisprudence of the international tribunals for former Yugoslavia and Rwanda and by the adoption of the Statute of the International Criminal Court.

90 UNHCR Background Note, para. 30.

Crimes against humanity
In accordance with Article 7 (1) of the ICC Statute, a crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined under paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the ICC; (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Article 7 (2) of the ICC Statute prescribes that the attack by which a crime against humanity is perpetrated must be widespread or systematic. This characteristic distinguishes the difference between this category of crimes and ordinary crimes that do not meet the level of crimes under international law.[91] According to the Statute, crimes against humanity can also take place in peacetime. It should also be noted that genocide is considered to be a sub-category of crimes against humanity. Article 6 of the ICC Statute defines genocide in a similar way to that one in the 1948 Genocide Convention.[92]

§ 2.5.3.2 Article 1 F (b)[93]

The IRO Constitution and the UNHCR Statute refer to extraditable cases in the context of exclusion. With reference to the IRO Constitution, the Universal Declaration of Human Rights and the UNHCR Statute Grahl-Madsen states the objective of exclusion is to ensure that international instruments are not abused by fugitives from justice, nor to interfere with the law of extradition. He continues with prescribing that the drafters of

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91 For an outline on the notion of 'crimes against humanity' see Pejic 2000.

92 The following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such fall under the definition of genocide: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

93 This clause reads as: he [or she] has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.

the Refugee Convention wanted to lay down more explicit criteria than those contained in either the Universal Declaration of Human Rights or the UNHCR Statute.[94]
Article 1F (b) contains a few elements which have to be assessed when deciding on exclusion under this clause. These are whether there are serious reasons for considering that the individual in question has committed the offence; secondly, whether the crime is serious, considered with due regard to context and individual circumstances; and at last, whether the crime is non-political.

To start with, the term 'serious crimes' has different meanings in different legal systems, which makes it difficult to give a fixed definition. According to the UNHCR Background Note, the drafters did not intend to refer to individuals who committed minor crimes. Hence, crimes such as theft and traffic violations cannot be sufficient grounds for exclusion. The seriousness of the crimes has to be determined according to the following factors: the nature of the act; the actual harm inflicted; the form of procedure used to prosecute the crime; the nature of the penalty for such a crime and whether most jurisdictions would consider the act in question as a serious crime. The UNHCR Handbook which prescribes that a serious crime refers to a capital crime or a very grave punishable act, also has to be understood in the light of the factors mentioned above.

According to the UNHCR Background Note a serious crime should be considered 'non-political' when other motives (such as personal reasons or gain) are the predominant feature of the specific crime committed. 'Where no clear link exists between the crime and its alleged political objective or when the act in question is disproportionate to the alleged political objective, non-political motives are predominant. Thus, the motivation, context, methods and proportionality of a crime to its objectives are important factors in evaluating its political nature'.[95]

Another relevant element of clause (b) is that the crime committed or presumed to have been committed must be done 'outside the country of refuge prior to the applicant's admission to that country as a refugee'. This can be the country of origin or another country, but not the country where the applicant seeks a refugee status.[96] Grahl-Madsen explains that the term 'country of refuge' should be read in the sense of any country where the person concerned would be safe from persecution, which means that a crime committed 'outside the country of refuge' connotes a crime committed

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94 Grahl-Madsen 1966, p. 290.
95 UNHCR Background Note 2003, para. 41.
96 UNHCR Handbook 2011, Part 1, para. 153.

before the person concerned became a refugee; it does not apply to any crime committed after that time, irrespective of where in the world it has been committed.[97] When a refugee commits a serious crime in the country of refuge, he would be subject to criminal prosecution according to the law in force of that country and risk possible expulsion under Articles 32 and 33 (2) of the Refugee Convention. These provisions apply to those who are recognised as refugees and considered to be a threat to the country of refuge. The refugee, to whom Article 33 (2) applies, loses the *non-refoulement* protection he would otherwise receive and expulsion to his former country is permitted when:

'there are reasonable grounds for regarding him as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'.[98]

The UNHCR Handbook states that 'it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. Accordingly, if a person has well-founded fear of very severe persecution, a crime must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a *bona fide* refugee. In evaluating the nature of the crime presumed to have been committed, all the relevant factors must be taken into account. Also the fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is relevant. In the latter case, there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates'.[99] The proportionality test will be discussed under § 2.6.4 in more detail where attention will also be paid to terrorism acts for which clause (b) is deemed important.[100]

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97 Grahl-Madsen 1966, pp. 302-304. According to the UNHCR 'admission…as a refugee' does not refer to the period in the country prior to recognition as a refugee; admission in this context includes mere physical presence in the country.

98 See Chapter 3 for a discussion on Article 33 (2) of the Refugee Convention.

99 UNHCR Handbook 2011, Part 1, paras. 156-157.

100 For more on Article 1F (b) in relation to terrorist acts see Kälin & Künzli 2000 and Rudy May 2004.

§ 2.5.3.3 Article 1 F (c)

What under clause (c) with the 'purposes and principles of the UN' indicates is shown in the Preamble and Articles 1 and 2 of the UN Charter.[101] There is no internationally accepted understanding of all those 'acts contrary to the purposes and principles of the UN'. The UNHCR Background Note states that there is 'some indication that the intention was to cover violations of human rights which, although falling short of crimes against humanity, were nevertheless of fairly exceptional nature and that in view of its vagueness, the lack of coherent state practice and being open for abuse by states, clause (c) must be interpreted restrictively'.[102] The Supreme Court of Canada ruled in the *Pushpanathan* case[103] that:

'Article 1F (c) will be applicable where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental rights as to amount to persecution, or are explicitly recognised as contrary to the UN purposes and principles'.

According to the UNHCR Handbook, Article 1F clause (c) overlaps with clauses (a) and (b) and does not introduce any specific new element. It is intended to cover in a general way such acts against the purposes and principles of the UN that might not be fully covered by the two preceding exclusion clauses.[104] Kwakwa explains that clause (c) should not be used in situations which would otherwise fall within the scope of clauses (a) and/or (b); it should only be used in situations which do not fall under clauses (a) and/or (b) and are an abundantly clear violation of fundamental rights that contravene the 'purposes and principles of the UN'.[105] Regarding terrorism acts which can fall under clause (b) and sometimes even under (a), the question whether clause (c) also plays a role rises. Goodwin-Gill summarises that:[106]

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101 The purposes of the UN are: to maintain international peace and security; to develop friendly relations among nations; to achieve international cooperation in solving socioeconomic and cultural problems and in promoting respect for human rights; and to serve as a centre for harmonising the actions of nations. The principles of the UN are: sovereign equality; good faith fulfillment of obligations; peaceful settlement of disputes; refraining from the threat or use of force against the territorial integrity or political independence of another State; and assistance in promoting the work of the UN.

102 UNHCR Background Note, para. 46.

103 *Pushpanathan v. Canada*, [1998] 1 SCR 982, 4 June 1998.

104 UNHCR Handbook 2011, Part 1, para. 162.

105 Kwakwa 2000, p. 91.

106 Goodwin-Gill & McAdam 2007, p. 197.

'While 'terrorism' may indeed be contrary to the purposes and principles of the UN and therefore a basis for exclusion under Article 1F (c), conformity with international obligations requires that decisions to exclude or subsequently to annul a decision on refugee status be taken in accordance with appropriate procedural guarantees. Article 1F (c) ought only to be applied, therefore, where there are serious reasons to consider that the individual concerned has committed an offence specifically identified by the international community as one which must be addressed in the fight against terrorism, and only by way of a procedure conforming to due process and the state's obligations generally in international law'.[107]

In relation to Article 1F (c), reference can be made to Resolution 1624 (2005) of the UN Security Council in which, among other things, it is recalled that 'the protection offered by the Refugee Convention and its Protocol shall not extend to any person with respect to whom there are serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the UN'. Furthermore, states are called upon to 'cooperate fully in the fight against terrorism and adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to among other things deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct'.[108] The UNHCR has issued a Note on the impact of this Resolution in which the Agency states that though Resolution 1624 seems to permit the exclusion of terrorist acts on the basis of Article 1F (c). It should also be observed that the Resolution 'confirms that exclusion requires an individual assessment and a determination on the basis of reliable information that there are serious reasons for considering that the person concerned has individual responsibility for such acts'.[109]

As only states are party to the Charter, another relevant question regarding clause (c) is whether it only applies to state entities or persons acting on behalf of states, or also to individuals acting as such. The UNHCR Handbook prescribes that it only applies to persons acting on behalf of the state, and 'an individual, in order to have committed an act contrary to these principles, must have been in a position of power in a Member State and instrumental to his state's infringing these principles'.[110] Goodwin-Gill explains that

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[107] For more on terrorism in relation to the exclusion clauses see, the UNHCR Background Note, paras. 79-86; Nyinah 2000 and Hathaway & Harvey 2001.

[108] UN Security Council Resolution 1624 (2005), 14 September 2005.

[109] UNHCR Note on the Impact of Security Council Resolution 1624 (2005) on the Application of Exclusion Under Article 1F of the 1951 Convention relating to the Status of Refugees, Department of International Protection, 9 December 2005.

[110] UNHCR Handbook 2011, Part 1, para. 163.

many commentators share the same view and would limit this clause (c) to heads of state and high officials, while reserving its exceptional application to individuals not necessarily connected with government, such as tortures and other guilty of flagrant violations of human rights. He states that 'the legislative history of Article 1F (c), considered together with the judicial and administrative decisions and practices of states and the UN, determines that the following general categories, in particular, may be excluded under clause (c): policy makers and those holding political responsibility, in situations where, for example, violations of human rights or other activities contrary to the purposes and principles of the UN have occurred, and where they may be considered to have covered such activities with their authority; the agents of implementation of such policies; individuals, whether members of organisations or not, who, for examples, have personally participated in the persecution or denial of the human rights of others; and those individuals, whether connected with the organisation of a state or not, who are considered to have committed terrorist or terrorist related acts'.[111]

§ 2.6 Exclusion analysis in the RSD procedure

According to the Guidelines on Exclusion, exclusion decisions should, in principle, be dealt within the context of the regular RSD procedure in order to make a full assessment of the factual and legal issues of the case. Though there is no rigid formula, UNHCR prefers the consideration of inclusion elements before exclusion. The summary conclusions from the expert roundtable state a number of reasons of a policy, legal and practical nature, for doing so. These are, *inter alia*, that exclusion before inclusion risks criminalising refugees; exclusion is an exception and it is not appropriate to consider an exception first and interviews which look at the whole refugee definition allow for information to be collected more broadly and accurately.[112] Exceptionally, exclusion may be considered first when there is an indictment by an international criminal tribunal and in cases at the appeal stage where exclusion is the question at issue. This is also the case when there is clear and readily available evidence pointing strongly towards the applicant's involvement in particularly serious crimes, notably in prominent Article 1F (c) cases.[113] The primary responsibility for the RSD procedures, including exclusion, lies with the authorities of the host state. In a number of countries, UNHCR participates in various forms in RSD procedures.[114]

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111 Goodwin-Gill & McAdam 2007, pp. 189-190.

112 Summary Conclusions: exclusion from refugee status, Expert roundtable organised by the UNHCR and the Carnegie Endowment for International Peace, hosted by the Luso-American Foundation for Development, Lisbon, Portugal 3-4 May 2001, p. 482.

113 UNHCR Background Note 2003, para. 100 and Guidelines on Exclusion, para. 31.

114 The Guidelines on the application of Article 1F in Mass-Influx Situation, para. 41

To deal with exclusion cases in a prompt way, UNHCR suggests specialised exclusion units within the institution responsible for RSD to be set up. The procedure of RSD is not specifically regulated and states are free to establish the procedure they believe is right. However, certain basic requirements for the procedure are laid down in the UNHCR Handbook among which include the following: the confidentiality of the asylum application should be respected at all times; applicants should receive the necessary guidance as to the procedure to be followed and be given the necessary facilities, including the services of a competent interpreter for submitting his case to the authorities concerned. They should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.[115] The Background Note prescribes procedural safeguards for exclusion in particular, which are also necessary to be considered in RSD in general such as, providing written reasons for exclusion, the right to appeal an exclusion decision to an independent body and no removal of the person concerned until all legal remedies against a decision to exclude have been exhausted.[116] According to the Guidelines on the application of Article 1F for child asylum claims, children should enjoy specific procedural and evidentiary safeguards to ensure that fair RSD decisions are reached with respect to their claims whether they are accompanied or not. In line with 'ExCom Conclusion on Children at Risk',[117] these Guidelines also state, *inter ali*a, that the claims of children should be processed on a priority basis; an independent, qualified guardian needs to be appointed immediately in the case of unaccompanied or separated children and appropriate communication methods need to be selected for the different stages of the procedure.[118]

After it has been decided whether the person meets the refugee definition, a three-step analysis is to be followed when there are indications that the person concerned has been involved in excludable acts. This exclusion analysis requires that: 1) the acts in question be assessed against the exclusion grounds, taking into account the nature of the acts as well as the context and all individual circumstances in which they occurred, 2) it be established in

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prescribes that UNHCR must examine the applicability of exclusion based on the criteria of Article 1F in the following situations: where the Office determines eligibility for refugee status of former combatants; in the context of cancellation or revocation proceedings, if exclusion considerations arise from persons whom UNHCR has previously recognised as refugees under its international protection mandate, either on a *prima facie* basis or following an individualized assessment of the merits of their claims.

115 UNHCR Handbook 2011, Part 2, para. 192.

116 UNHCR Background Note 2003, para. 98.

117 ExCom Conclusions, No. 107 (LVIII) – 5 October 2007, Children at Risk.

118 UNHCR Guidelines on the application of Article 1F for child asylum claims, pp. 25-28.

each case that the person committed a crime which is covered by one of the sub-clauses of Article 1F, or that the person participated in the commission of such a crime in a manner which gives rise to criminal liability in accordance with internationally applicable standards and 3) it be determined, in cases where individual responsibility is established, whether the consequences of exclusion of refugee status are proportional to the seriousness of the act committed.[119]

§ 2.6.1 First two steps of the exclusion analysis

An answer to the question what kind of conduct is considered to be excludable under the exclusion clauses in Article 1F is discussed in the previous paragraph. It can be briefly stated that 'for acts committed during armed conflict by soldiers, Article 1F (a) is the most relevant exclusion clause. Crimes against peace, which also fall under clause (a), and acts contrary to the purposes and principles of the UN, under clause (c), have generally been interpreted as requiring action by someone in a high position of authority representing a state or a state-like entity. Serious non-political crimes, under Article 1F (b) would also generally not apply unless it was determined that the crime was not linked to the armed conflict itself'.[120]

Whereas clause (b) requires that the crime in question must have been committed 'outside the country of refuge prior to admission to that country as a refugee', the other exclusion clauses contain no temporal or territorial references and are, therefore, applicable at any time, irrespective of the country where the act took place. The standard of proof under Article 1F is 'serious reasons for considering' which does not require a determination of guilt in the criminal justice sense, but is more than a simple suspicion.[121] A criminal conviction in the host country for the crime which falls under the exclusion clauses is thus not necessary for the application of Article 1F. Clear evidence is required and non-cooperation in itself does not establish guilt in the absence of clear and credible evidence of individual responsibility. The Background Note states that 'it is always important to assess the reasons for the individual's non-cooperation as it may be due to problems of understanding, trauma, mental capacity, fear or other factors'. Consideration of exclusion in such cases may, however, be irrelevant if non-cooperation means that the basics of an asylum claim cannot be established.[122]

With regard to the evidence, it is laid down that 'anonymous evidence (where the source is concealed) may be relied upon in exceptional cases, only where this is absolutely necessary to protect the safety of witnesses and the asylum seeker's ability to challenge the substance of the evidence is not substantially

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119 Idem para. 62 and UNHCR Advisory Opinion, 12 September 2005 p. 6.
120 UNHCR Advisory Opinion, 12 September 2005, pp. 6-7.
121 Bliss 2000.
122 Guidelines on Exclusion, para. 35.

prejudiced. Secret evidence or evidence considered in camera (where the substance is also concealed) should not be relied upon to exclude'. For cases in which certain evidence is being withheld within the scope of national security interests of a country, the UNHCR prescribes that such interests may be protected by introducing procedural safeguards which also respect the asylum seeker's due process rights.[123]

In all cases, the determination of a refugee claim, including application of the exclusion clauses requires an individualised assessment; each case must be evaluated on its own facts.
The Guidelines on the application of Article 1F for child asylum claims explain that the rules and principles that also address the special status, rights and protection afforded to children under international and national law at all stages of the asylum procedure have to be considered. Especially those related to 'the best interest of the child, the mental capacity of children and their ability to understand and consent to acts that they are requested or ordered to undertake need to be considered' in accordance with the 1989 Convention on the Rights of the Child. Though the Refugee Convention does not make a distinction between adults and minors, the exclusion clauses may not apply at all in the case of a young child and can only be applied to a child when they have reached the age of criminal responsibility as established by international and/or national law at the time of the committed act.[124] There is no unambiguous answer to what this age is, as there is no universally recognised age limit which results in disparities between states' practice.[125] The ICC applies the age of eighteen and has no jurisdiction for those who were under eighteen when committing the offence. The individual assessment of a claim also counts in mass-influx situations and the fact that individual RSD is usually not practicable in mass-influx situations does not justify group exclusion.[126] According to the Guidelines on the application of Article 1F in mass-influx situations 'preparation and planning for exclusion procedures and related measures should begin early on, and a number of steps may be taken from the initial stages of mass-influx situation to facilitate the conduct of exclusion proceedings as soon as possible'.[127] The Background Note prescribes that in large-scale movements, 'suspected armed elements should be interned in a location away from the refugee camp and should not automatically benefit from a *prima facie* RSD. They should not be considered as asylum seekers until the authorities have established within a reasonable

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123 UNHCR Background Note 2003, para. 112.
124 UNHCR Guidelines on the application of Article 1F for child asylum claims, para. 59-63.
125 If the age of criminal responsibility is higher in the country of origin, this should also be taken into account in the child's favour.
126 Guidelines on Exclusion in Mass-Influx Situations, para. 18.
127 Idem, p. 3.

time-frame that they have genuinely renounced military activities. Once this has been determined, their claims, including consideration of exclusion will be examined on an individual basis'.[128] UNHCR believes taking part in armed conflict is not itself a ground for exclusion, although an assessment of the person's conduct during armed conflict will be required. Detention of 'normal' persons (who not have been involved in armed conflict) whose exclusion is being examined is permitted only under certain limited conditions, when detention is not arbitrary and is imposed for as long as necessary.[129] With individual assessment, the application of the exclusion clauses requires individual responsibility to be established in relation to the committed act under Article 1F.

§ 2.6.2 Individual responsibility

To exclude a person from a refugee status, individual responsibility must be established regarding the crime which falls under Article 1F. In general, individual responsibility arises when the person has committed or made a substantial contribution to the criminal act, in the knowledge that their act or omission would facilitate the criminal conduct.[130] The person does not need to have physically committed the criminal act in question; 'instigating, aiding and abetting and participating in a joint criminal enterprise can suffice'.[131] The degree of involvement of the person concerned has to be carefully analysed in each case. Persons with a senior position in a repressive government or members of an organisation involved in unlawful violence are not automatically excluded from a refugee status.[132] A presumption of responsibility reversing the burden of proof may, however, arise where the individual has remained a member of a government clearly engaged in activities that fall within the scope of Article 1F. This is also the case

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128 UNHCR Background Note 2003, para. 96-97.

129 Guidelines on Exclusion in Mass-Influx Situations, para. 58.

130 Idem, para. 51.

131 ICC *Kvočka and others* case, App. No. IT-9830/1, 2 November 2001, para. 122 et seq. See also Article 25 of the ICC Statute which sets out the grounds for individual responsibility under its jurisdiction.

132 Article 28 of the ICC Statute deals with commander/superior responsibility and states that a military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

when a person volunteered to be a member of an organisation of which the purposes, activities and methods are of a particularly violent nature, such as indiscriminate killing, injury of the civilian population or acts of torture. According to the Background Note 'caution must be exercised when such a presumption of responsibility arises, when considering the actual activities of the group, the organisation's place and role in the society in which operates, its organisational structure, the individual's position in it and their ability to influence significantly its activities and the possible fragmentation of the group'. Exclusion is also not automatically justified when an individual is associated with an organisation designated as a terrorist group on a list of the international community. However, a presumption of individual responsibility may arise when the list has a credible basis and the criteria on the list are such that all members or the listed persons can reasonably be considered to be individually involved in violent crimes.[133]

To have individual criminal responsibility for the committed offence, the person concerned has to satisfy the *mens rea* requirement which means that he must have acted with knowledge and intent. Article 30 of the ICC Statute defines knowledge as an awareness that certain circumstances exist or that a consequence would occur in the ordinary course of events. A person has intent where the person meant to engage in the conduct at issue or to bring about a particular consequence. If the *mens rea* is missing, the person cannot be held responsible for the offence. There are situations, in which the person may not have the mental capacity to be responsible, such as children. As previously stated, young children cannot be excluded at all and for children who might be individually responsible for an excludable act, the issue whether they have the necessary mental state has to be a central factor in the exclusion analysis.[134] The assessment needs to consider elements such as the child's emotional, mental and intellectual development. It is important to determine whether the child was sufficiently mature to understand the nature and consequences of its conduct and, thus, to commit, or participate in, the commission of the crime.[135] When it is concluded that the mental capacity is present, other reasons for rejecting individual responsibility have to be taken into account.

§ 2.6.3 Defences to the exclusion

Defences to criminal liability mentioned by the UNHCR are superior orders, duress/coercion and self-defence or defence of other persons or property. In the case of child soldiers, questions of immaturity and

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133 UNHCR Background Note 2003, paras. 50-62 and UNHCR Statement on Article 1F, July 2009, see also § 3.4.2 for more on the exclusion of persons who are members of a terrorist organisation.

134 Happold 2002, pp. 1131-1176.

135 Guidelines on the application of Article 1F for child asylum claims, para. 64.

involuntary intoxication can be added. With regard to the first mentioned defence, Article 33 of the ICC Statute prescribes that it will only apply if the individual in question was under a legal obligation to obey the order in question, was unaware that the order was unlawful and the order itself was not manifestly unlawful. Duress only applies when the act in question results from a threat of imminent death or of continuing or imminent serious bodily harm to him or another person, and that the person does not intend to cause greater harm than the one sought to be avoided.[136] An additional element for consideration from international case law is that the situation leading to the duress must not have been voluntarily brought about by the person concerned. Additional factors to be taken into consideration for the determination whether duress applies in the claims of child soldiers are, *inter alia*, the age at which the child became involved in the armed forces or group; the length of time they were a member; the consequences of refusal to join the group; any forced use of drugs, alcohol or medication; the level of education and understanding of the events in question; and the trauma, abuse or ill-treatment suffered by the child as a result of their involvement.[137] Even if circumstances do not give rise to a defence, the circumstances which reduce the level of a person's individual responsibility for a crime and in the case of children, the vulnerability of those who are subjected to ill-treatment should be taken into account when considering the proportionality of exclusion which will be discussed in the next subparagraph.[138]

The Background Note explains that in the situation wherein the excluded person has already served a penal sentence, each case requires an individual consideration on the application of Article 1F, with relevant factors such as passage of time since the offence was committed, the seriousness of the offence and whether the person has expressed regret or renounced criminal activities. In the case of the worst crimes it may be considered that the person still does not deserve protection and should be excluded. According to the UNHCR Handbook, there is a presumption that Article 1F is no longer applicable in the case of pardons or amnesties, unless it can be shown that despite the pardon or amnesty, the applicant's criminal character still dominates.[139] This means that in some cases, a crime may be of such a heinous nature that the application of Article 1F is still considered justified despite the existence of a pardon or amnesty.[140]

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136 Article 31 (d) of the ICC Statute.

137 Advisory opinion, 12 September 2005, p. 9-11.

138 The Advisory opinion prescribes that the forcible conscription of children under the age of 18 is a violation of human rights law and of children under the age of 15, whether forcible or not, and their active use in hostilities is considered a war crime, p. 12.

139 UNHCR Handbook 2011, Part 1, para. 157.

140 UNHCR Background Note 2003, para. 72.

§ 2.6.4 Proportionality

The last stage of the exclusion analysis concerns the proportionality test.[141] The UNHCR expresses that consideration of proportionality is an important safeguard in the application of Article 1F as the consequence of the exclusion is the denial of a set of rights attached to refugee status, including protection from removal to a country where the person could face persecution. The concept of proportionality is not expressly mentioned in the Refugee Convention or the *travaux preparatoires*, but 'has evolved particularly in relation to Article 1F (b) and represents a fundamental principle of many fields of international law'. The test means that when a decision on exclusion is being reached and individual responsibility is established, the gravity of the offence in question must be weighed up against the degree of persecution feared upon return. If it is plausible that the person will face severe persecution, the criminal act in question needs to be very serious to exclude the person. However, when the offences are crimes against peace, crimes against humanity and acts falling under Article 1F (c), such a test is not required as the acts are so grave.[142] In the case of children factors such as age, maturity and vulnerability must be taken into account, even if the circumstances do not give rise to a defence. For child soldiers, possible mitigating factors such as ill-treatment of the child by military personnel or circumstances of service can be added. The consequences and treatment that the child may face upon return also need to be considered.[143] The UNHCR states that in addition, the proportionality test should include an examination whether other guarantees under human rights instruments will apply.

Besides the three-step analysis discussed above, there are a few more points to be mentioned which are also relevant within the framework of the exclusion analysis. The next subparagraph will deal with the subjects of the burden of proof, reasons for cancellation/revocation and the position of family members.

§ 2.6.5 Relevant aspects related to the exclusion analysis

For asylum claims in general, the legal principle is that the burden of proof lies with the person submitting a claim. However, it is often the case that persons fleeing from persecution arrive with almost nothing and are therefore unable to support their statements by documentary or other proof. The UNHCR Handbook states that 'while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. With respect to

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141 For a detailed discussion on the proportionality test see Rasulov 2002.

142 Guidelines on Exclusion, para. 24.

143 Guidelines on the application of Article 1F for child claims, para. 64.

exclusion cases, the burden of proof shifts to the state (or UNHCR) and the applicant should be given the benefit of the doubt. According to the UNHCR Handbook, 'the benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility; his/her statement's must be coherent and plausible and must not run counter to generally known facts'.[144] Shifting the burden of proof in exclusion cases is 'consistent with the exceptional nature of the exclusion clauses and the general principle that the person wishing to establish an issue should bear the burden of proof'. In some cases, the burden of proof may be reversed which leads to a rebuttable presumption of excludability. It has been previously discussed that this may be the case when the applicant has remained a member of a government clearly engaged in activities that fall within the scope of Article 1F. In addition, when the applicant has been indicted by an international criminal court, the burden of proof is reversed. To refute the presumption in such cases, the applicant needs to have a plausible explanation regarding non-involvement or dissociation from any excludable acts, coupled with an absence of serious evidence to the contrary.[145]

In cases wherein facts are revealed after recognition of the person as a refugee which would have justified exclusion and thus that the person should not have been recognised as a refugee in the first place can lead to cancellation of the refugee status.[146] The standards applicable to the cancellation of refugee status are set out in the UNHCR Note on the Cancellation of Refugee Status.[147] The UNHCR Handbook states that 'normally it will be during the process of determining a person's refugee status that the facts leading to exclusion under these clauses will emerge. It may however, also happen that facts justifying exclusion will become known only after a person has been recognised as a refugee. In such cases, the exclusion clause will call for a cancellation of the decision previously taken'.[148] It is important to note that the cancellation is not related to the person's conduct after refugee determination. If a person commits a crime in the country of refuge, they are liable to criminal prosecution according to the laws of that country. They can risk an expulsion to the country of origin, but the action does not per se lead to revocation of refugee status. However, when the offence falls within the scope of Article 1F (a) or (c), revocation of the status would be appropriate, provided all the criteria for the application of these clauses are met.[149]

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144 UNHCR Handbook 2011, Part 2, para. 204.
145 UNHCR Background Note 2003, para. 110.
146 Such reasons can be for instance that the person has given a false presentation of the facts or possesses another nationality than declared.
147 UNHCR Note on the Cancellation of Refugee Status, 22 November 2004.
148 In cancellation cases, the person concerned is not and has never been a refugee.
149 UNHCR Background Note 2003, para. 17.

In mass-influx situations where recognition as a refugee was made on a *prima facie* basis, exclusion is often examined in the context of cancellation.[150] It is laid down in the Guidelines on the Application of Article 1F in Mass-Influx Situations that it is for the decision maker to establish the facts to support a decision to cancel refugee status on exclusion grounds. If the available evidence does not meet the threshold for exclusion, cancellation of refugee status may still be justified in those cases where non-cooperation and/or lack of credibility would have justified a rejection if it had arisen during the examination of the initial claim. Notification of intent to cancel or revoke should be given in time to enable the person concerned to prepare for the interview or hearing and regardless of the grounds for cancellation, the decision to cancel the refugee status should be reviewed on appeal.[151]

UNHCR expresses with regard to extradition proceedings that in general refugee claims must be determined in a final decision before execution of any extradition order. This is not necessary when the person concerned does not risk indirect *refoulement* in case of extradition to a third state or is surrendered to an international criminal tribunal.[152] If the host state has jurisdiction over the acts which caused exclusion, it may start criminal proceedings in its national justice system, though this will not always be the case and not easy concerning the gathering of evidence.

According to the principle of family unity, dependants are normally granted a refugees status when the head of the family is eligible for a refugee status. In the case of exclusion of the main applicant, this does not mean that family members are also automatically excluded. Their asylum claims need to be determined on an individual basis. If there are serious reasons for considering that family members are individually responsible for excludable crimes, they will be denied a refugee status. When family members are recognised as refugees, the excluded person cannot rely on the right to family unity in order to receive a refugee status.[153] The Guidelines on Exclusion in Mass-Influx Situations add that 'in those cases where the separation of potentially excludable persons from the group of refugees and their subsequent confinement is warranted, their family members should not be subjected to such measures unless this is necessary and justified because they themselves come within the scope of exclusion and that exceptions may be considered where it is the wish of family members to stay with their detained or interned relative'.[154]

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150 Guidelines on Exclusion in Mass-Influx Situations, para. 27.
151 Idem, p. 10.
152 UNHCR Background Note 2003, para. 102.
153 Idem, para. 94.
154 Guidelines on Exclusion in Mass-Influx Situations, para. 59.

§ 2.7 Conclusion

After the Second World War, the time when the Refugee Convention was drafted, the memory of the trials of major war criminals was still very much alive and there was agreement on the part of states, that war criminals did not deserve protection and should be denied admission to their territories. This view led to the adoption of Article 1F in the Convention which contains three exclusion clauses. These clauses prescribe when an asylum seeker is to be excluded from a refugee status, but answers to all kinds of questions relating to this exclusion are not provided. The fact that there is no international refugee tribunal providing conclusive interpretations on the Convention means that Member States' practices concerning the application of the exclusion clauses differ. In order to give authorities, who have to determine refugee status and possibly exclusion, general guidelines to hold on to, the UNHCR compiled comprehensive documents which are considered to have persuasive authority but are not binding. The UNHCR Handbook, Background Note and several Guidelines on, *inter alia*, children and mass-influx, discuss how the clauses should be interpreted and various aspects relating to exclusion which staff members may encounter in practice. According to the UNHCR a three-step exclusion analysis has to be followed when there are indications that a person has been involved in excludable acts. After an individual assessment of the case, individual responsibility regarding the crime concerned has to be established. Members of an organisation involved in unlawful violence or designated as a terrorist group are not automatically excluded. However, this situation can cause the reversal of the burden of proof. The last stage of the analysis concerns the proportionality test, which means that when an exclusion decision is taken and individual responsibility is established, the gravity of the offence must be weighted up against the degree of persecution feared upon return to their country of origin.

The Handbook states that 'the determination of refugee status is by no means a mechanical and routine process. On the contrary, it calls for specialised knowledge, training and experience, and what is more important, an understanding of the particular situation of the applicant and the human factors involved'.[155] This also applies in the exclusion process within the RSD; The UNHCR can provide general guidance, but eventually each case must be considered on its own merit and it is up to the officials of the Member States to deal with it properly.

[155] UNHCR Handbook 2011, Part 2, para. 222.

Chapter 3 EU legislation and case law on the exclusion clauses

§ 3.1 Introduction

In the previous chapter, I looked into the history of the drafting proceedings of Article 1F in the Refugee Convention. In addition, I studied the UNHCR's point of view on the application of the exclusion clauses in the Refugee Status Determination procedure which are laid down in several non-binding authoritative papers. Besides these UN documents, Europe has also developed its own immigration and asylum law. As Boeles states, 'there is no such thing as a coherent and complete set of binding rules within a single European legal order that can be said to embody European migration law.[156] This chapter will deal with the sphere of the EU to be followed by the Council of Europe (CoE) which will be discussed in Chapter 4.

The aim of creating a Common European Asylum System as set out in the Tampere European Council Conclusions of 1999, led to the adoption of secondary legislation within this field which falls under the Directorate-General of Home Affairs. With the CEAS, the EU pursues to stop the diversity in national asylum legislations and practices among states which it sees as one of the main factors for asylum flows to Europe. As it is beyond the scope of this study to discuss all EU legislation within this area, the following paragraphs will deal with the four main asylum Directives: the Temporary Protection Directive, he Reception Conditions Directive, he Qualification Directive and the Directive on Asylum Procedures. The focus will particularly be on the inserted provisions on exclusion within the scope of these Directives. In this discussion, consideration will be given to comments made on the exclusion provisions and the recast Directives which replaced the originals and serve as starting point for this research. Also attention will be paid to the Returns Directive which is to be seen as the key instrument in the EU's return policy[157] and EU Charter of Fundamental Rights. Further, I will elaborate on the available reports of cases before the ECJ regarding the exclusion provisions of the Directives finalising the chapter with a commentary.

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156 According to Boeles, Den Heijer, Lodder & Wouters 2009, p. 35, at least five legal spheres exist: national legislation of European States; EU legislation; treaties concluded within the framework of the Council of Europe; treaties concluded within the UN; bilateral and multilateral treaties concluded between Member States of the EU and third countries.

157 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals.

§ 3.2 Asylum policy at EU-level

The Maastricht Treaty which was adopted in 1992 formally recognised asylum law as a common interest of the EU.[158] Though several instruments were adopted in the EU on asylum after 1992, the insertion of a new title IV (Visas, Asylum, Immigration and other policies related to free movement of persons - Articles 61-69) in the EC Treaty (TEC) provided the Union Institutions with new powers to develop binding legislation within this field. With this Treaty, the Union committed to establish an area of freedom, security and justice of which Article 61 TEC forms the legal basis. Article 63 TEC deals with asylum, immigration and safeguarding the rights of third country nationals. According to Battjes, the powers on asylum matters given to the Community by Article 63 TEC are conditioned in four respects: 'firstly, by the objective to create an area of freedom, security and justice; secondly, the degree of harmonisation that Community measures can produce; thirdly, imposing the obligation to adopt measures on most asylum issues within five years of the entry into force of the TEC and fourthly, the standards paragraph 1 sets for its subsections as they must be in accordance with the Refugee Convention, 1967 Protocol and other relevant instruments of international law'.[159] These measures as stated under paragraph 1 deal with the following areas: (a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States; (b) minimum standards on the reception of asylum seekers in Member States; (c) minimum standards with respect to the qualification of nationals of third countries as refugees and (d) minimum standards on procedures in Member States for granting or withdrawing refugee status. Article 63 (2) TEC concerns measures on refugees and displaced persons in the areas of: (a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection; (b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons.

In 1999, the TEC entered into force and a special meeting was held in Tampere where the European Council discussed its Justice and Home Affairs provisions. According to the Tampere milestones, 'the aim is an open and secure EU, not only to its own citizens but also applicable to third country nationals'. One of the main topics at the summit was to work towards 'a CEAS, based on the full and inclusive application of the Geneva Convention', thus ensuring that nobody is sent back to persecution, i.e. maintaining the

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158 Treaty on EU, 7 February 1992.
159 Battjes 2006, p. 140.

principle of *non-refoulement*.[160] At Tampere it was decided to construct the CEAS in two stages of which the first stage (five-year programme) aimed to harmonise Member States' legal frameworks on the basis of common minimum standards ensuring fairness, efficiency and transparency.[161] Within this framework, several legislative measures are adopted between the years 1999-2006 in the field of asylum, of which the four main measures are:

- Temporary Protection Directive;[162]
- Reception Conditions Directive;[163]
- The Qualification Directive;[164]
- Directive on Asylum Procedures.[165]

Other measures adopted in this period that also apply to asylum cases are, *inter alia*, the Family Reunification Directive,[166] Eurodac -and Dublin II Regulation.[167]

A new five-year programme followed the Tampere Programme. The Hague Programme set out ten priorities for the Union with a view to strengthening the area of freedom, security and justice from 2005 to 2010.[168] The Programme invited the EC to conclude the evaluation of the first-phase legal

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160 Tampere Summit Conclusions, 15-16 October 1999, point 13.

161 Green Paper on the future Common European Asylum System, Brussels, 6.6.2007, COM(2007) 301 final, p. 2.

162 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass-influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ L 212, 7.8.2001, p. 12).

163 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ L 31, 6.2.2003, p. 18).

164 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304, 30.9.2004, p. 12).

165 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326, 13.12.2005, p. 13).

166 Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification.

167 For an exhaustive overview of the legislative measures, financial programmes and other documents adopted within the scope of the CEAS between 1999-2006 see Green Paper on the future Common European Asylum System Brussels, 6.6.2007, COM(2007) 301 final.

168 Communication from the Commission to the Council and the European Parliament of 10 May 2005- The Hague Programme: ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice [COM(2005) 184 final – Official Journal C 236 of 24.9.2005].

instruments and submit the second-phase instruments and measures to the Council and European Parliament with a view to their adoption before the end of 2010. In June 2007, the Commission presented a Green Paper for an in-depth reflection and debate on the future developments of the CEAS.[169] The results of the evaluation formed the basis for a Policy Plan on Asylum in 2008 in which the Commission claims that despite the important asylum *acquis* which binds Member States, large discrepancies still exist between asylum decisions adopted by the different Member States and believes it is necessary to accompany legal harmonisation with effective practical cooperation in the form of creating a European Asylum Support Office.[170] In the light of the Policy Plan, the European Council presented the European Pact on Immigration and Asylum in the same year.[171] In its Pact, the Council makes five commitments which need to be converted into concrete measures, in particular what will follow the Hague Programme in 2010. To construct a Europe of asylum, the Council agreed to establish an EASO as already proposed by the Commission, which was set up in November 2010. Among other things, the tasks of the EASO are to support Member States in their efforts to implement a more consistent and fairer asylum policy, for example by helping to identify good practices, organizing training at European level and improving access to accurate information on countries of origin and work closely with the authorities responsible for asylum in the Member States and with the Office of the UNHCR.[172] In 2008, also the Returns Directive was adopted.

Although, with the entering into force of the Lisbon Treaty on 1 December 2009, the Commission planned the CEAS by the end of 2010, the deadline for the completion of the second phase of the CEAS was rescheduled. With the Lisbon Treaty, the European Community was replaced by the EU which succeeded it and took over all its rights and obligations. The Treaty on European Union kept the same name and the TEC became the Treaty on the Functioning of the European Union (TFEU). The legal framework in asylum policy, as was laid down in Article 63 TEC is modified into Article 78 TFEU. Article 78 (1) TFEU prescribes that 'The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third country national requiring international protection and ensuring compliance with the *non-refoulement* principle'. The policy must be in accordance with the Refugee Convention,

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169 Green Paper on the future Common European Asylum System.

170 Policy Plan on Asylum – An integrated approach to protection across the EU, COM(2008) 360 final, 17.6.2008, p. 6.

171 Brussels, 24 September 2008 (07.10) 13440/08.

172 <http://easo.europa.eu/> (last accessed on 21 September 2015). In Chapter 8, I will elaborate on the EASO with regard to the task of drawing up country reports.

1967 Protocol and other relevant treaties. Contrary to Article 63 TEC, this provision does not refer to 'minimum standards' anymore but to 'common procedures/system'. Another new aspect is that Article 78 (2) of the TFEU states that measures shall be adopted for a CEAS comprising: a 'uniform status' of asylum/subsidiary protection. In addition to Article 63 TEC, the Lisbon Treaty has brought some other relevant changes which influence the EU asylum policy. These were:

- The Charter for Fundamental Rights which includes the right to asylum[173] and prohibition of the *non-refoulement* principle is given full legal status and is accepted as legally binding;[174]
- The scope for activity of the ECJ is extended to full jurisdiction over Justice and Home Affairs and
- Decisions on Justice and Home Affairs are subject to the ordinary legislative procedure and qualified majority voting. The last mentioned is a voting system whereby 55% EU Council members (fifteen states), representing at least 65% of the EU's population must vote in favour of a proposal from the Commission for it to pass. Votes are spread in relation to the size of a country.[175] Article 78 (2) and (3) of the TFEU regarding measures concerning a CEAS[176] is also transferred to the qualified majority vote.

In addition to the entry into force of the Lisbon Treaty in December 2009, the Stockholm Programme was also adopted by the European Council on which the current work of the DG Home Affairs is based. The Stockholm Programme sets out the EU's priorities for the area of justice, freedom and security for the period 2010-2014 in which the Council outlines that it is 'time for a new agenda to enable the Union and its Member States to build on the achievements of the Tampere and Hague Programmes and to meet future challenges'. According to the Programme all actions taken in the future should be centered on the citizens of the Union and other persons for whom the Union has a responsibility. The Union should, in the years to come, work on 6 main priorities among which, 'a Europe built on fundamental rights' and 'a Europe of responsibility, solidarity and partnership in migration and asylum matters'. The Council states that the area of freedom, security and justice must be a single area in which fundamental rights and freedoms are protected.[177] The Council recalls that the establishment of a CEAS by 2012

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[173] See Article 18 of the EU Charter.

[174] Along with Poland and the Czech Republic, the UK negotiated the right to opt-out from the Charter.

[175] The new voting rule that emerged with the Lisbon Treaty came into force in November 2014.

[176] Article 78 TFEU are ex Articles 63, points 1 and 2 and 64 (2) of the TEC.

[177] European Council, The Stockholm Programme - an open and secure Europe serving and protecting citizens (2010/C 115/01).

which is based on a full and inclusive application of the Refugee Convention and other international treaties remain a key policy objective for the Union and states that it:[178]

'remains committed to the objective of establishing a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection. While CEAS should be based on high protection standards, due regard should also be given to fair and effective procedures capable of preventing abuse. It is crucial that individuals, regardless of the Member State in which their application for asylum is lodged, are offered an equivalent level of treatment as regards reception conditions, and the same level as regards procedural arrangements and status determination. The objective should be that similar cases should be treated alike and result in the same outcome'.

As the Stockholm Programme ended in March 2014, the European Commission adopted a communication titled 'An open and secure Europe: making it happen',[179] which identifies the central issues to be tackled over the next years regarding the Home Affairs area.

§ 3.3 Current asylum *acquis*

As mentioned above, four main Directives on asylum law have been adopted during the first phase of the CEAS of which Article 63 TEC, by now changed into Article 78 TFEU forms the legal basis. The Directives only apply to third country nationals or stateless persons and are thus not applicable to EU citizens. This is in accordance with Protocol no. 29 on asylum for nationals of EU Member States which falls under the Amsterdam Treaty of 1997.[180] Taking for granted that the Union shall respect the fundamental rights as guaranteed by the ECHR, Member States are considered as safe countries of origin in respect of each other in asylum issues. Accordingly, any application for asylum made by a national of a Member State may be taken into consideration or declared admissible for processing by another Member State only in the cases as laid down in the Protocol.[181]

The European Council underlined in the Hague Programme the importance of reconsideration of the procedures used for implementing these instruments. To achieve a common level of procedures and uniform statuses. On the basis of evaluations done by the Commission and organisations, such

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178 Stockholm Programme, under heading 6.2.

179 <http://ec.europa.eu/dgs/home-affairs/e-library/documents/basic-documents/docs/an_open_and_secure_europe_-_making_it_happen_en.pdf> (last accessed on 21 September 2015).

180 OJ C 321, E/306 (2006).

181 See Protocol <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12006E/PRO/29:EN:HTML> (last accessed on 21 September 2015).

as Amnesty International and the European Council for Refugees and Exiles (ECRE), which are interested in the asylum matter and comments delivered to the Directives by these organisations, shortcomings have been identified and where necessary a proposal for a recast of the Directive in question was adopted. UNHCR is one of the organisations which followed the development of EU asylum law and also made comments and recommendations on the Directives. The competence of this Office is recognised in EU law as it laid down in Article 78 (1) TFEU that a common policy on asylum, subsidiary protection and temporary protection must be in accordance with the Refugee Convention.[182] The discussion of the Directives on asylum law in the following subparagraphs will particularly focus on the provisions relating to the exclusion clauses of Article 1F of the Refugee Convention, which are put in the table below. Article 72 of the TFEU should also be mentioned because it allows Member States to make public order exceptions concerning the entry and residence of third country nationals. This means that to maintain public order and internal security, states have the power to impose restrictive measures concerning the application of EU asylum law.

Temporary Protection Directive	Exclusion from temporary protection: Article 28 Right to challenge the exclusion: Article 29
Recast Reception Conditions Directive	Articles 8-11 on detention (see 8 (3) (e) when protection of national security or public order so requires)
Recast Qualification Directive	Exclusion and revocation from refugee status: Articles 12 & 14 Exclusion and revocation from subsidiary protection: Articles 17 & 19 Protection from *refoulement*: Article 21
Recast Directive on Asylum Procedures	Examination procedure: Article 31 (8) (j)

[182] Also Declaration 17 to the TEC prescribed that 'consultations shall be established with the UNHCR and other relevant international organisations on matters relating to asylum policy'. UNHCR's supervisory role is further recognised in Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office. Recital 10 of the Regulations' Preamble prescribes that the Support Office should act in close cooperation with UNHCR and in recital 17 is laid down that UNHCR should have a non-voting seat on the EASO's Management Board.

Though the Returns Directive does not include specific provisions relating to exclusion, it is also of importance for those who fall under Article 1F. The application of Article 1F leads to the situation that the alien is not eligible for refugee or subsidiary protection and if the state concerned does not grant a stay on any other ground, the person becomes illegal. That is where this Directive is applicable because it applies to third country nationals staying illegally in a Member State. Article 1 of the Directive states that this Directive set outs out common standards and procedures to be applied in Member States for returning illegally staying third country nationals and makes a reference to respect fundamental rights and international law obligations as general principles of EU law, among which the ECHR and Refugee Convention are explicitly stated. This is also expressed in Article 5 in four specific rights, including the principle of *non-refoulement*. According to Article 9 (1) (a), states have to postpone removal when it violates this principle and aliens should be provided with certain safeguards during this postponement.[183] Within this perspective is recital 12 relevant which lays down that 'the situation of third country nationals who are staying illegally but who cannot yet be removed should be addressed and their basic conditions of subsistence should be defined according to national legislation'. Several provisions of the Directive will be dealt with later on in this study when it concerns the discussion of subjects relating to those.[184]

§ 3.3.1 Temporary Protection Directive

This Directive from 2001 is the first instrument adopted under the Tampere Programme which the Member States had to implement by 1 January 2003. It establishes minimum standards for temporary protection in the event of a mass-influx of displaced persons from third countries who are unable to return to their country of origin and, promotes a balance of effort between Member States in receiving and bearing the consequences of receiving such persons. The Commission states in its Explanatory Memorandum that:
'the consequences of a mass-influx of displaced persons in the Union impose such pressures on the asylum system that special arrangements are necessary to give immediate protection to the persons who need it and avoid blocking up the asylum system, which would be against the interests not only of states but also of other persons seeking protection outside the mass-influx'.[185] The

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[183] Article 14 (1) of the Returns Directive prescribes that during the period for which removal has been postponed in accordance with Article 9, states have to take into account as far as possible that a) family unity with family members in their territory is maintained; b) emergency health care and essential treatment of illness are provided; c) minors are granted access to the basic education system subject to the length of their stay and d) special needs of vulnerable persons are taken into account.

[184] See § 3.3.2.1 and § 4.3.

[185] Explanatory Memorandum, COM(2000) 303 final, p. 3.

Commission particularly referred here to the experience of EU countries concerning a large-scale movement of people fleeing the conflict in former Yugoslavia and later Kosovo. According to recital 9 of the Preamble, the standards and measures of the Member States for temporary protection are laid down in one single instrument for reasons of effectiveness, coherence and solidarity and, in particular, to avert the risk of secondary movements.
Temporary protection is an exceptional measure which appears from the fact that the existence of a mass-influx of displaced persons has to be established by the Council adopted by qualified majority vote on a proposal from the Commission. The Council decision referring to a specific group of persons shall introduce temporary protection with respect to them in all Member States.[186] Before the decision is taken, each Member State has to indicate its capacity of reception in figures or in general terms which is included in this decision.[187] The duration of temporary protection is one year, with a possible automatic extension of two six-month periods for a maximum of one year. After this period, the temporary protection can be extended by another year and ends when the maximum duration of three years is reached or at any time by a Council decision adopted by qualified majority on a proposal of the Commission when the country of origin is considered to be safe.[188] The Directive covers the voluntary return of former temporarily protected persons as well as the forced return which has to be conducted with due respect for human dignity. In the case of forced return, compelling humanitarian reasons which may make return impossible or unreasonable in specific cases have to be considered by Member States.[189] Kerber states that especially mentioned are persons whose state of health does not allow travelling. Other compelling reasons against forced return are the continuation of an armed conflict or serious human rights violations, or the fact that return is not realistic due to an ethnic or other affiliation of a person or group of persons or not possible due to an imminent danger of torture or cruel or inhuman treatment.[190] Chapter 3 of the Directive deals with the obligations of Member States towards persons enjoying temporary protection and prescribes, *inter alia*, that residence permits during the protection period, medical assistance, suitable accommodation and access to the education system for persons under 18 years must be ensured.

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186 Article 5 of the Directive.
187 This derives from the fact that the Temporary Directive is based on the assumption that Member States shall handle in a spirit of community solidarity as laid down in Article 25 (1).
188 Article 6 of the Directive.
189 Articles 21-22 of the Directive.
190 Kerber 2002, p. 209.

§ 3.3.1.1 Exclusion from temporary protection

Pursuant to Article 28 (1) of the Directive, Member States may exclude a person from temporary protection based on the four grounds stated, of which the first three correspond to the grounds of Article 1F of the Refugee Convention.[191] The first ground conforms with Article 1F (a) of the Refugee Convention and excludes a person if there are serious reasons for considering that they committed a crime against peace, a war crime or a crime against humanity, as defined in international instruments.[192] The second ground, prescribed in paragraph 1 (a) (ii), excludes a person if they have committed a serious non-political crime outside the Member State of reception prior to the admission to that country which corresponds to Article 1F (b) of the Refugee Convention. The difference between this clause and Article 1F (b) is that formulations on the balance test and classifying particularly cruel actions as non-political crimes are added. This way, the clause on the whole reads as follows: a person may be excluded when there are serious reasons for considering that 'they have committed a serious non-political crime outside the Member State of reception prior to his or her admission to that Member State as a person enjoying temporary protection'. The severity of the expected persecution is to be weighed against the nature of the criminal offence of which the person concerned is suspected. Particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes. This applies both to the participants in the crime and to its instigators'. Thirdly, a person may be excluded if he or she has been guilty of acts contrary to the purposes and principles of the UN.[193] The last exclusion ground is prescribed in Article 28 (1) (b) of the Directive: a person may be excluded from temporary protection if 'there are reasonable grounds for regarding him or her as a danger to the security of the host Member State or having been convicted by a final judgment of a particularly serious crime, he or she is a danger to the community of the host Member State'. This ground is not derived from Article 1F, but from Article 33 (2) of the Refugee Convention. As it is also included in the same wordings or in a different form in provisions of the other Directives to be dealt with, a more detailed discussion on this ground can be found under § 3.3.3.

Article 28 (2) lays down that the application of the exclusion grounds of the first paragraph shall be based only on the personal conduct of the person concerned and that the decision of exclusion is based on the principle of proportionality. According to Article 29 of the Directive, persons who

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191 Recital 22 of the Directive prescribes that it is necessary to determine criteria for the exclusion of certain persons from temporary protection in the event of a mass-influx of displaced persons.

192 Article 28 (1) (a) (i).

193 Article 28 (1) (a) (iii) of the Directive which corresponds to Article 1F (c) of the Refugee Convention.

have been excluded from the benefit of temporary protection or family reunification shall be entitled to mount a legal challenge in the Member State concerned which does not necessarily require a judicial body. This latter provision is formulated in general terms and does not express whether it only applies to persons excluded under Article 28. According to Kerber, 'it might be better to interpret the provision in a wider sense, i.e. giving the right to mount legal challenge to any person excluded by a Member State from temporary protection for any reason which might for example be because somebody is regarded as not belonging to the protected group'.[194]

§ 3.3.2 Reception Conditions Directive

The Tampere Conclusions prescribed that the CEAS should include common minimum conditions on the reception of asylum seekers. This requirement resulted in the Reception Conditions Directive for those waiting for a decision on their asylum application in one of the Member States. According to its Preamble, the aim of the Directive is to ensure a dignified standard of living and comparable living conditions in all Member States for asylum seekers and help limit the secondary movements of asylum seekers because of differences in reception conditions in Member States.[195] Therefore, applicants, must amongst others, be informed about their rights and the benefits they may claim, as well as the obligations with which they must comply, receive a document certifying their status as an asylum seeker and move freely within the territory of the Member State. Though the last mentioned right is the rule as prescribed in Article 7 (1), there are exceptions to it. When it proves necessary, for example for legal reasons or reasons of public order, asylum seekers may be detained.[196] When there are reasons for the authorities to consider the applicability of Article 1F of the Refugee Convention on an applicant, the person is often kept detained during the investigation. In such cases, Member States may exceptionally set modalities for material reception conditions different from those provided in Article 14 for a short as possible period.[197] The ones set out in the latter provision deal with accommodation, food and clothing; health care; access to the education system for minors and take into account the specific situation of vulnerable persons.[198] Article 16 of the Reception Conditions Directive deals with situations in which states can reduce or withdraw reception conditions. The rationale behind this provision is that Member States must be able to sanction

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194 Kerber 2002, p. 213.
195 Recitals 7 and 8 of the Directive.
196 Article 7 (3) of the Reception Conditions Directive.
197 See Article 14 (8) of the Directive which with the proposal for a recast of the Reception Conditions Directive is changed into Article 18 (8) (c).
198 Articles 13; 10 and 17-20 respectively of the Reception Conditions Directive.

those asylum seekers who abuse the reception system.[199] This is the case when the applicant disappears without reasonable cause or does not comply with requests for information or fails to appear for personal interviews concerning the asylum procedure; has withdrawn his application; presents a threat to national security or is suspected of having committed a war crime or a crime against humanity.[200] The latter situation, which is relevant within the scope of the exclusion clauses, was prescribed in the Commission's legislative proposal for the Reception Conditions Directive as 'if an applicant is regarded as a threat to national security or there are serious grounds for believing that the applicant has committed a war crime or a crime against humanity or if, during the examination of the asylum application, there are serious and manifest reasons for considering that grounds of Article 1F of the Geneva Convention may apply with respect to the applicant'.[201] The European Parliament amended the ground into: 'if an applicant is regarded as a threat to national security or there are serious grounds for believing that the applicant has committed a war crime or a crime against humanity *or a terrorist offence, as referred to in Council Framework Decision of ... on combating terrorism (1)*, or if, during the examination of the asylum application, there are serious and manifest reasons for considering that grounds of Article 1 (F) of the Geneva Convention may apply with respect to the applicant'.[202] This phrase including an explicit reference to Article 1F is eventually deleted and replaced by the words: 'that Member States may determine sanctions applicable to seriously violent behaviour'.[203] Article 16 (4) of the Reception Conditions Directive prescribes that decisions regarding reduction, withdrawal, refusal or sanctioning of reception conditions must be taken objectively and impartially, based on the individual behaviour of the person concerned and that emergency health care has to be provided in all cases. Asylum seekers who receive such a decision have the possibility to appeal their case before a judicial body.

§ 3.3.2.1 Recast Reception Conditions Directive

The deadline for transposition of the Reception Conditions Directive in the Member States was 6 February 2005. On 26 November 2007, the Commission issued its Evaluation Report on this Directive. The deficiencies in the national reception conditions as addressed in this Report,

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199 See also recital 12 of the Directive.

200 <http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33150_en.htm> (last accessed on 21 September 2015).

201 Legislative proposal, COM(2001)0181.

202 <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P5-TA-2002-202> (last accessed on 21 September 2015).

203 Article 16 (3) of the Reception Conditions Directive.

together with the contributions received in response to the Green Paper on the CEAS made the Commission come up with a proposal to recast the Reception Conditions Directive[204] and a modified proposal for a recast in June 2011.[205] The situation as it stands at the moment is that a new recast Reception Conditions Directive has been adopted and in accordance with the EU *acquis*, in particular with the Qualification Directive, the scope of this Directive is extended in order to include applicants for subsidiary protection.[206] The new Directive aims to clarify and provide more flexibility to the reception standards and ensure adequate and comparable reception conditions throughout the EU. The Reception Conditions Directive was in force until 21 July 2015 after which the new Directive became applicable.

A relevant change in the recast Directive within the context of exclusion is amongst others that new provisions are added regarding the detention of applicants. Hence, Article 7 (3) of the Directive concerning detention has been deleted and four new provisions have been introduced which deal particularly with detention. According to Article 8 (1) of the recast, states may not hold a person in detention for the sole reason that he/she is an applicant for international protection. Paragraph 2 of the same provision prescribes that: 'when it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant to a particular place in accordance with national legislation, if other less coercive measures cannot be applied effectively. An applicant may only be detained to a particular place a) in order to determine, ascertain or verify his identity or nationality; b) in order to determine the elements on which his application for asylum is based which in other circumstances could be lost; c) in the context of a procedure, to decide on his right to enter the territory; d) when he is detained subject to a return procedure under the Returns Directive to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely to delay or frustrate the enforcement of the return decision; e) when protection of national security or public order so requires or f) in accordance with Article 28 of Regulation (EU) No 604/2013

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204 Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers, Recast COM(2008) 815 final, 2008/0244 (COD).

205 Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (recast), Brussels 1.6.2011, COM(2011) 320 final.

206 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), L 180/96.

of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person. Contrary to Article 7 (3) of the Directive which used the general phrase 'when it proves necessary for example for legal reasons or reasons of public order', Article 8 (2) of the recast allows detention only in exceptional cases and on one of the 6 limited grounds. In Article 9 of the proposal for a recast, the guarantees for detained asylum seekers are laid down. The provision determines, *inter alia*, that detention shall be for the shortest period possible and detention shall be reviewed by a judicial authority at reasonable intervals. The last two provisions on detention; Articles 10 and 11 of the recast deal respectively with detention conditions and the detention of vulnerable groups and of applicants with special reception needs.

There is a varied practice among Member States on detention: it can be used at the beginning of the asylum procedure and also at the end in order to enforce removal. An important instrument with regard to the latter situation is the Returns Directive which is also mentioned above under ground (d).[207] This Directive which was adopted in 2008 allows Member States to detain a person who is the subject of return procedures in order to prepare the return and/or carry out the removal process. The ECJ decided in the *Kadzoev* case that detention for the purpose of removal based on the Returns Directive and detention of an asylum seeker under the Asylum Procedures and Reception Conditions Directives and the applicable national provisions fall under different legal rules.[208] Asylum applicants do not fall under the personal scope of the Returns Directive as long as they have a right to remain in the Member State because their stay cannot be considered as illegal in the sense of the Returns Directive.[209]

The detention of asylum seekers who are waiting for a decision on their application remains an issue of concern for NGOs. Though the introduction of Article 8 of the recast Directive with limited grounds for detention is considered to be a positive development as it can prevent arbitrary acts by Member States, there is criticism on the grounds which are summed up under paragraph 3. One of these points is that detaining an asylum seeker in the context of a procedure to 'decide on his right to enter the territory' allows for systematic detention of asylum seekers in any entry procedure, regardless of whether they have proper documentation, which is not compatible with the exemption from penalties as laid down in Article 31 of the Refugee

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[207] See Zwaan 2011.
[208] ECJ 30 November 2009, *Said Shamilovich Kadzoev (Huchbarov),* App. No. C-357/09.
[209] Spijkerboer & Arbaoui 2010, pp. 1280-1281.

Convention.[210] The ground: 'when protection of national security or public order so requires', which is relevant in relation to asylum seekers to whom Article 1F is possibly going to be applied, is considered to be open to a broad interpretation. Amnesty International and ECRE recommend a restrictive interpretation and believe detention on this ground should only be possible when the asylum seeker constitutes a genuine, present and sufficiently threat to the Member State. According to these organisations, the threat should be assessed on the basis of the individual conduct of the person and not on general assumptions based on nationality or country of origin.[211] A reference has to be made here to the 2012 UNHCR Detention Guidelines for Asylum Seekers which represent UNHCR's policy and are intended as advice for governments and other bodies making decisions on detaining people.[212] The topic of alien's detention will be discussed in more detail in Chapter 4 when dealing with Article 5 ECHR.

Besides the changes concerning detention, the contents of Article 16 of the Reception Conditions Directive (dealing with reduction or withdrawal) under Article 20 of the recast Directive have also been modified. The new Directive changes the term 'reception conditions' into 'material reception conditions'; limits the circumstances under which reception conditions can be fully withdrawn; deletes the paragraph on the refusal of conditions (paragraph 2) and states that Member States shall under all circumstances ensure access to health care and ensure a dignified standard of living for all

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[210] Comments from the ECRE on the Amended Commission Proposal to recast the Reception Conditions Directive (COM(2011) 320 final), September 2011; Comments from ECRE on the European Commission Proposal to recast the Reception Conditions Directive, April 2009; UNHCR Comments on the European Commission's Proposal for a recast of the Directive laying down minimum standards for the reception of asylum seekers (COM (2008)815 final of 3 December 2008); Amnesty International's Comments on the Commission Proposal for a Directive laying down Minimum Standards for the reception of asylum seekers (recast) (COM(2008) 815 final) and on the Commission Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (recast) (COM(2008) 820 final).

[211] Amnesty International's Comments on the Commission Proposals for a Directive laying down Minimum Standards for the reception of asylum seekers (recast) (COM(2008) 815 final) and on the Commission Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (recast) (COM(2008) 820 final) and Comments from ECRE on the Amended Commission Proposal to recast the Reception Conditions Directive (COM(2011) 320 final), September 2011.

[212] <http://www.unhcr.org/505b10ee9.html> (last accessed on 21 September 2015).

applicants.[213] Another amendment is that when decisions on withdrawal or reduction are appealed, Member States have to ensure access to legal assistance free of charge where the asylum seeker cannot afford the costs involved.[214] The current Article 16 (3) of the Directive, the ground on which Member States can sanction applicants who conduct seriously violent behaviour, remains unmodified in the new Directive.[215] Finally, the power of states to set different modalities for material reception conditions on asylum seekers who are detained or confined to border posts, including possible 1F applicants, has been deleted as the recast Directive no longer allows for this.

§ 3.3.3 Qualification Directive

It is undisputed that this Directive is the most relevant instrument within the scope of creating a CEAS as it deals with the substantive asylum law of Europe. Though the deadline for the transposition of the original Qualification Directive by Member States was 10 October 2006, many states failed to meet this requirement. Subsequently, the Commission took measures against these states. After the expiry of the date, several studies were conducted on the implementation of the Directive and the way it was applied in practice based on the preliminary available data. The Commission concluded on the basis of the evaluation of the information gathered on the implementation that the adopted minimum standards were vague and ambiguous resulting in incompatibility with the evolving human rights and refugee law standards; not achieving a certain level of harmonisation and a negative impact on the quality and efficiency of decision-making. According to the Commission, the same applied to the Asylum Procedures Directive which will be dealt with in the next paragraph. To ensure a higher degree of harmonisation and better substantive and procedural standards of protection towards the establishment of a common asylum procedure and a uniform status, the Commission presented a proposal for the amendment of both of these Directives. The proposal for amending the Qualification Directive[216] is by now already a recast and in force.[217] Member States had the period until

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213 Under the current Reception Conditions Directive, the rule is that Member States shall under all circumstances ensure access to emergency health care.

214 See Article 26 (2) of the recast Directive.

215 In the recast Reception Conditions Directive, Article 16 (3) is changed into 20 (4).

216 Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, Brussels 21.10.2009 COM(2009) 551 final.

217 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

21 December 2013 to transpose the amendments into their national laws after which the recast Directive will be evaluated again in 2015.

The Commission prescribed in its explanatory memorandum to the proposal for a recast that the amendments to the Directive are expected to simplify decision-making procedures, improve the efficiency of the asylum process and to ensure coherence with the jurisprudence of the ECJ and ECtHR. Furthermore, it is stated that the changes 'aim to remove the difference in the treatment of the two categories (refugee status and subsidiary protection) which cannot be considered as objectively justified, thus progressing towards uniformity of protection while maintaining the distinction between the two statuses'. The original Qualification Directive is the first supranational instrument which establishes a status for extra Convention refugees which should be understood as additional protection to the refugee protection as laid down in the Refugee Convention. According to Article 2 (f) of the recast Directive, a person who is eligible for subsidiary protection is a:

'third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17 (1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country'.[218] The Commission explains the following within this context:

'when subsidiary protection was introduced, it was assumed that this status was of a temporary nature. As a result, the Directive allows Member States the discretion to grant them a lower level of rights in certain respects. However, practical experience acquired so far has shown that this initial assumption

[218] According to the Commission the definition of subsidiary protection is largely based on international human rights instruments relevant to subsidiary protection, such as Article 3 of the ECHR, Article 3 of the CAT and Article 7 of the ICCPR. Though this is the case, there are differences in the protection provided by these treaties and the Directive. An example is the indication of Article 17 in the definition which contains an exclusion clause for subsidiary protection, while the *non-refoulement* principle of Article 3 ECHR and 3 CAT are absolute and cannot be restricted. On the other hand, while the ECHR only protects against *refoulement*, a beneficiary of subsidiary protection can claim several rights. Article 15 is the main provision regarding subsidiary protection and prescribes the qualification criteria. It contains three categories of harm, namely: a) death penalty or execution; or b) torture or inhuman or degrading treatment of punishment of an applicant in the country of origin; or c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict of which the last one is a controversial topic.

was not accurate. It is thus necessary to remove any limitations of the rights of beneficiaries of subsidiary protection which can no longer be considered as necessary and objectively justified. Such an approximation of rights is necessary to ensure full respect of the principle of non-discrimination, as interpreted in recent case law of the ECtHR and of the UN Convention on the Rights of the Child. It responds moreover to the call of the Hague Programme for the creation of a uniform status of protection'.

This idea is expressed in recital 39 of the recast Directive which states that 'with the exception of derogations which are necessary and objectively justified, beneficiaries of subsidiary protection should be granted the same rights and benefits as refugees, and should be subject to the same conditions of eligibility'. The distinction made between refugee and subsidiary protection status in several provisions is deleted and changed into beneficiaries of international protection. This is not the case with regard to the provisions concerning exclusion which will be discussed in the following subparagraphs.

As stated above, the purpose of the recast Directive is expressed as to lay down standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. In accordance with the Tampere conclusions, the Directive is based on the full and inclusive application of the Refugee Convention and sees the Convention as the cornerstone of the international legal regime for protection.[219] The definition of a refugee as stated by the Directive is almost similar to Article 1 (A) (2) of the Refugee Convention. Different from the Convention's refugee definition is that the Directive only applies to third country nationals and that an extra phrase has been added to the text which states 'and to whom Article 12 does not apply'. The latter refers to the exclusion clauses for refugees which will be dealt with in detail in this paragraph. It can be said that the Directive aims to clarify the constitutive elements of the refugee definition in the Refugee Convention and the rights that flow from refugee status, thus add more details to it. The Directive contains a clear lay-out in which Chapter II deals with the assessment of the application, which counts for all applications for protection, even when the issue of exclusion is raised.[220] Chapters III and IV are devoted to the qualification criteria as a refugee and refugee status, while Chapters V and VI prescribe provisions on the criteria for subsidiary protection and this status. Articles 20 to 35 under Chapter VII lay down the

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[219] Recitals 3 and 4 of the Recast Directive.

[220] New Issues in Refugee Research, evidentiary assessment and the EU Qualification Directive, UNHCR 2005, p. 14.

content of international protection and state the rights assigned to refugees and subsidiary protection.

A comparison between refugee and subsidiary protection status shows that the recast Directive assigns partly the same rights and, in some cases, a lower level of benefits for subsidiary protection. The latter is also expressed because the exclusion clauses for subsidiary protection are broader than the ones for refugees. With regard to refugees, the relevant provisions within the exclusion context can be found in Articles 12 (which prescribes when a person is excluded from being a refugee) and 14. The latter provision states in which cases a refugee status can be revoked or ended and is sometimes called the 'revocation clause'. In the case of subsidiary protection, the equivalents to these provisions are Articles 17 and 19 of the Directive. Within the context of the recast all four of these provisions remain unchanged. Article 21 on the protection of *refoulement* is also unmodified. The UNHCR and ECRE commented on the proposal for a recast of the Qualification Directive and both also address the unchanged exclusion and revocation clauses.[221] Attention is paid to Article 12 (2) (b) and UNHCR reiterates that this provision should be amended to reflect the wording of the Refugee Convention and that the sentence 'which means the time of issuing a residence permit based on the granting of refugee status' should be deleted. This is also proposed for Article 12 (3) of the Directive. Both organisations already criticised Article 14 in their comments on the original Directive. This way, the UNHCR notes that the Article should be changed to bring it in conformity with the Convention and ECHR recommends Articles 14 (4) and 14 (5) of the Directive should not be applied by Member States as they are not in line with the Refugee Convention.

Before discussing the provisions on exclusion,[222] I want to briefly focus on what the Commission's 2010 report on the application of the Qualification Directive states concerning these provisions. This report is based on a study

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221 UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009); Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Qualification Directive, March 2010.

222 The explanation of the provisions concerning exclusion is based on the discussions held and comments given on the original Qualification Directive. When the term 'Commission's original proposal' is used, this concerns thus the proposal for the previous Qualification Directive. As the recast Directive did not change the provisions with respect to exclusion, the discussions held about the original Directive are also applicable and relevant regarding the recast.

conducted on behalf of the Commission and on information from other studies which set forth that:[223]

- The exclusion and revocation of a refugee status based on Articles 12 and 14 (1), (3) of the Directive and of subsidiary protection on Articles 17 (1) - (2), 19 (1) and (3) are mandatory provisions, while a number of states merely allow the exclusion on these grounds instead of making them obligatory.
- The optional ground of exclusion in Article 17 (3) of the Directive has been transposed by 13 Member States while, on the other hand, certain Member States have introduced additional grounds for exclusion.[224]
- When a permanent residence permit is issued to the refugee, termination of status is restricted or prevented in some Member States, despite the fulfillment of the criteria for exclusion.
- Some Member States grant an exceptional leave to remain in the country in the case of exclusion. This is possible when, for example, it concerns a persons' ill-health or danger of *refoulement*.[225]
- Article 14 (6) of the Directive has not been transposed in several countries.
- Articles 14 (2) and 19 (4), according to which the national authorities must demonstrate on an individual basis that a person has ceased to be, or has never been a refugee or a person eligible for subsidiary protection, are not, or only partially implemented by a number of states.

§ 3.3.3.1 Article 12 of the Directive

This Article is a mandatory provision which similar to the Refugee Convention, excludes three groups of persons. Paragraph 1 covers Articles 1D and E from the Refugee Convention. The third group which concerns

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223 Report from the Commission tot the European Parliament and the Council on the application of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection, 2010, p. 2.

224 According to a study of the Hungarian Helsinki Committee of 2012, four Member States include all exclusion grounds, including 'threat to national security or host society' under the same provision and terminology, while three states make a distinction between the exclusion grounds in Article 1F of the Refugee Convention and the additional ground of 'threat to national security', p. 41-42.

225 The ECRE report of 2008 on the implementation of the Directive in Member States ('The Impact of the Qualification Directive on International Protection') also showed that certain Member States allow excluded persons who cannot leave due to Article 3 of the ECHR to stay legally in the country, while in others such as the Netherlands, Belgium and France, excluded persons who are usually tolerated, but often without any rights of status.

Article 1F is laid down in paragraph 2. This paragraph contains three subsections which, to a great extent, correspond to clauses in Article 1F and are prescribed as follows. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
c) he or she has been guilty of acts contrary to the purposes and principles of the UN as set out in the Preamble and Articles 1 and 2 of the Charter of the UN.

Subsection (a) is similar to Article 1F (a) and excludes persons who have committed crimes against peace, war crimes or crimes against humanity. Subsection (b) in both instruments is quite different. Article 1F requires serious non-political crimes to have been committed outside the country of refuge and prior to admission to the country of refuge as a refugee. According to the UNHCR, the term 'admission' refers to the mere physical presence in the country of refuge, which means that the crime could have been committed anywhere, except in the country of refuge where the asylum seekers applies for a refugee status.[226] The UNHCR explains that 'such an interpretation is based on the rationale that crimes committed in the country of refuge are considered within the context of Article 33 (2) of the Refugee Convention, rather than in the context of the exclusion clauses'.[227] Contrary to Article 1F (b), the Directive explicitly states that 'admission as a refugee' means 'the time of issuing a residence permit based on the granting of refugee status' which appears to lengthen the period during which a person could commit a crime and thus allow for exclusion of persons who commit a serious crime within the country but before their formal recognition as a refugee. According to Hailbronner this is not the case as, 'it is evident from the provision's wording that only a crime committed or presumed to have been committed "outside the country of refuge prior to his admission" is a

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[226] UNHCR Handbook 2011, Part 1, para. 153.

[227] UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, January 2005 (OJ L304/12 of 30.09.2004), p. 27.

ground for exclusion'. He also explains that before the issuance of a residence permit based on the granting of a refugee status, a person will normally not be able to move outside the country of refuge.[228] Storey formulates that the 'teleological interpretation of subsection b) so as to refer to the Directive's objects and purposes, which is based on a full and inclusive application of the Refugee Convention could somehow overcome the apparent difficulty'.[229]
It should be noted that the Commission's original proposal of the Directive did not contain the added phrase 'which means the time of issuing a residence permit based on the granting of refugee status' but prescribed in draft Article 14 (1) (c) (ii) that 'the applicant has committed a serious non-political crime prior to his or her admission as a refugee'. Though the Commission did not add 'outside the country of refuge' to the sentence as laid down in Article 1F (b), the explanation to draft Article 14 (1) (c) in which the Commission refers to 'situations covered by Article 1F of the Refugee Convention', shows that the Commission intended to follow UNHCR's interpretation.[230]
Another difference between Article 1F (b) and Article 12 (2) (b) of the Directive is that while Article 1F only mentions 'serious non-political crimes', the latter has the following additional phrase to the subsection: 'particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes'. The Commission explains that in applying subsection b) 'the severity of the expected persecution should be weighed against the nature of the criminal offence of which the person concerned is suspected' it and thus refers to a proportionality test. In the literature it is assumed that the second phrase of subsection b) implicitly acknowledges that such a test is inherent to Article 1F (b) of the Refugee Convention.[231]
Article 12 (2) (c) of the Directive refers to the Preamble and Articles 1 and 2 of the Charter of the UN which Article 1F (c)[232] does not have. The original proposal did not contain the reference and the Commission explained that this subsection 'shall reflect the fact that the fundamental principles laid down in the Charter of the UN should govern the relations of its members with each other and in relation to the international community as a whole'.[233] Battjes states that France initiated the reference as within the Member States, it appears to be the only Contracting State that applies Article 1F (c) on a more or less regular basis.[234] Moreover, Articles 1 and 2 of the Charter are also identified as the relevant provisions for the purposes of Article 1F (c) by

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228 Hailbronner 2010, p. 1117.
229 Storey 2008, p. 24.
230 Brussels, 12.9.2001 COM(2001) 510 final, 2001/0207 (CNS), p. 25.
231 Battjes 2006, p. 264.
232 Article 1F (c) of the Refugee Convention reads as: 'or has been guilty of an act contrary to the purposes and principles of the UN'.
233 COM (2001) 510 final, p. 25.
234 Battjes 2006, p. 286.

the UNHCR. Recital 31 of the recast Directive relates to subsection c) and states that the purposes and principles of the subsection are, amongst others, embodied in the UN anti-terrorism resolutions.[235] The UNHCR protested against this, because:

'an interpretation of the language of Article 1F (c) to include acts of 'terrorism' without proper qualification may lead to an overly extensive application of this particular exclusion clause, especially in view of the fact that 'terrorism' is without a clear or universally agreed definition. For the purposes of interpreting and applying Article 1F (c), only those acts within the scope of UN Resolutions relating to measures combating terrorism which impinge upon the international plane in terms of their gravity, international impact, and implications for international peace and security, should give rise to exclusion under this provision'.[236]

Another point made by the UNHCR is that this subsection only concerns persons who have been in a position of power in their countries or in state-like entities which is not in accordance with what is laid down in the recital. Hailbronner explains that no uniform state practice can be identified regarding this exclusion clause and that the wording as well as the recent international practice supports a broader interpretation than UNHCR's notion. Reference is, *inter alia*, made to the case law of the ECJ which pointed to the binding character of Security Council decisions and to the exclusive responsibility of the Security Council to decide what constitutes a threat to international peace and security.[237]
Article 12 of the Directive has one last paragraph stating that 'paragraph 2 applies to persons who instigate or otherwise participate in the commission of crimes or acts mentioned therein'. Paragraph 3 clarifies the scope of the exclusion clauses prescribed in paragraph 2. Article 1F is not formulated as such and it is generally accepted that mere membership of a group or organisation involved in violent crimes is not necessarily a sufficient basis to be individually responsible for excludable acts.[238] Following the Canadian

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[235] The UN Anti-Terrorism Resolutions declare that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the UN' and that 'knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the UN'.

[236] UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, January 2005 (OJ L304/12 of 30.09.2004), p. 6.

[237] Hailbronner 2010, pp. 1121-1122.

[238] The International Military Tribunal accepted this, see Grahl-Madsen 1966, p. 277; UNHCR Guidelines on the Application in Mass-influx Situations of the Exclusion

Federal Court *Ramirez* case,[239] some countries require a 'personal and knowing participation' to exclude a person. The original proposal (draft Article 14 (2)) was in line with this practice as it stated that 'the grounds for exclusion shall be based solely on the personal and knowing conduct of the person concerned'. No agreement could be reached on the precise meaning of the term 'knowing conduct' and its relevance to the different categories of subsections (a) - (c). The proposal was first changed into a reference to the personal and willing conduct of the person concerned and in the end entirely deleted. The new paragraph 3 on participation corresponds to recital 31 of the Preamble which excludes persons who instigate or otherwise finance, plan or incite terrorist acts.[240]

Draft Article 14 (3) and (4) of the Commission's original proposal which provided for additional rules besides the listed exclusion grounds were both cancelled. Paragraph 3 contained a judicial remedy against a decision to exclude but due to the general concept of the Directive to incorporate procedural issues in the Asylum Procedures Directive, it was dismissed during the Council negotiations.[241] Paragraph 4 prescribed that the application of the exclusion would not in any manner affect obligations of Member States under international law, in particular those of the ECHR. Though this paragraph has been deleted, this does not mean that an excluded person who falls outside the scope of the Directive cannot invoke Article 3 of the ECHR in the case of expulsion to his home country. Member States still have to respect the *non-refoulement* principle in accordance with their international obligations which is also laid down in Article 21 (1) of the Qualification Directive.[242]

§ 3.3.3.2 Article 14 of the Directive

On the basis of Article 14, a Member State must and may revoke, end or refuse to renew a refugee status. The provision was not included in the Commission's original proposal but was included during Council negotiations. Hailbronner explains that:

Clauses of Article 1F of the 1951 Convention relating to the Status of Refugees, paras. 18-19 and ECJ 9 November 2010, *Bundesrepublik Deutschland v. B & D* case.

239 *Ramirez v. Minister of Employment and Immigration*, [1992] 2 FC 306. After *Ezokola v. Canada* (Citizenship and Immigration), 2013 SCC 40SC, 19 July 2013 the Canadian authorities replaced the personal and knowing participation test by the contribution-based test.

240 Hailbronner 2010, p. 1122.

241 Article 39 (1) (a) of the Asylum Procedures Directives provides for a right to an effective remedy against a decision on the application for asylum as well as against a decision to withdraw refugee status was.

242 Article 21 (2) of the Directive allows exceptions to the *non-refoulement* principle and will be discussed later on in this Chapter.

'the suggestion of some Member States to extend the list of exclusion grounds to cases dealt with in Article 33 (2) of the Refugee Convention and cases where the national security of the host state may be endangered and applicants arriving from safe third countries was discussed in the Council but eventually rejected due to objections by a number of Member States arguing the incompatibility of an extension of the list of exclusion grounds with the Refugee Convention. As a compromise, it was agreed that the suggested grounds should not be inserted into the draft Article 14 on exclusion but in the newly worded Article 14 on revocation of refugee status'.[243]

Paragraphs 1 to 3 of the provision are mandatory and include a cessation and exclusion ground referring to Articles 11 and 12 of the Directive. According to paragraph 3 (a), the refugee status must be terminated when the person 'should have been or is excluded from being a refugee in accordance with Article 12'. The distinction between 'should' and 'is excluded' takes into consideration the different situations regulated by Article 12, covering subsequent events (Article 12 (1) (a)) or the existence of exclusion grounds before a person has applied for international protection.[244] Paragraph 3 (b) states that a Member State must also terminate refugee status when it is discovered that the person's misrepresentation or omission of facts, including the use of false documents, were decisive for the granting of refugee status. Battjes expresses that this ground, though not explicitly mentioned in the Refugee Convention, is quite compatible with it, as a person who was recognised on the basis of false evidence, was never a Convention refugee.[245] The UNHCR commented that the mere use of false documents should not render a claim fraudulent nor result automatically in cancellation of refugee status. This should only be the case if the statements were objectively false and if there was an intention to mislead the decision maker.[246]

An additional possibility to terminate the refugee status of a person is laid down in paragraph 4. This is the case when there are reasonable grounds for regarding a person as a danger to the security of a Member State in which he or she is present or where he or she constitutes a danger to the community of the Member State because of a conviction by a final judgment of a particularly serious crime. According to paragraph 5, in situations as stated under paragraph 4, Member States may decide not to grant a status

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243 Hailbronner 2010, pp. 1129-1130.

244 Idem, p. 1132.

245 Battjes 2006, p. 268.

246 UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, January 2005 (OJ L304/12 of 30.09.2004), p. 28.

to a refugee, where such a decision has not yet been taken.[247] Contrary to paragraphs 1-3, paragraph 4 leaves it to the discretion of Member States to decide on the application. The wording is based on Article 33 (2) of the Refugee Convention which is also the reason why Article 14 has been criticised.[248] The UNHCR expressed that Article 14 seems to conflate and confuse exclusion, cessation, cancellation and revocation.[249] According to ECRE, Article 14 (4) serves no purpose other than to attempt to expand the criteria for exclusion from refugee status in ways the Convention does not permit and comments that it is misleading to call Article 14 a revocation provision as there is no meaningful difference between revocation and exclusion as prescribed in Article 12 of the Directive. Also the fact that the Directive's Article 21 (2) allows Member States to revoke the right to *non-refoulement* for the same reasons as prescribed in Article 14 (4) of the Directive makes the latter provision redundant.[250]
Under the Convention, Article 1F and Article 33 (2) serve different purposes, as the first deals with the exclusion clauses, while the latter is concerned with the treatment of persons who are deemed refugees, but who nonetheless may be removed under the Convention. This is why UNHCR commented that assimilating Article 33 (2) to the exclusion clauses of Article 1F would be incompatible with the Refugee Convention and moreover lead to a wrong interpretation of the Conventions provisions.[251] Within this context, McAdam states 'that a person who is excluded from refugee status is denied all the rights provided for by the Convention (and the Qualification Directive). By contrast, a refugee issued with an expulsion order in accordance with Article 33 (2) remains entitled to at least those rights that are not linked to lawful stay. Even though he or she may in practice not be able to benefit from them, thus rendering the difference insignificant in real terms, it is important not to entrench Article 33 (2) as a formal exclusion clause'.[252]

The Commission is of the opinion that Article 14 reflects the exception to the principle of *non-refoulement* as set out in Article 33 (2) of the Refugee Convention. During the drafting stages, the Commission and Member

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247 This means that fulfillment of conditions for recognition as refugee does not imply a right to get a status, when it is apparent that the grounds for revocation or termination of a status are fulfilled.

248 Though Article 33 (2) of the Refugee Convention and Article 14 (4) have the same wording, there is a relevant difference between the two. While the Directive deals with terminating refugee status, provides Article 33 (2) for an exception to the prohibition of *refoulement*, without ending or denying refugee status.

249 UNHCR Annotated Comments 2005, p. 28.

250 ECRE, The Impact of the Qualification Directive on International Protection, October 2008, p. 24.

251 UNHCR Annotated Comments 2005, p. 31.

252 McAdam 2007, p. 15.

States have argued that Article 14 (4) does not conflict with the scope of the Refugee Convention, because the person is not excluded from being a refugee as such; the provision merely allows Member States to decide to strip them of certain rights: 'In other words, although the person is formally speaking a refugee, he/she cannot claim the rights and benefits attached to that status.[253] Paragraph 6 provides that refugees to whom Article 14 (4) or 14 (5) applies, remain entitled to some of the Convention rights that apply to all refugees, irrespective of the legality of their presence.[254] This paragraph thus recognises that denial of the benefit of the principle of *non-refoulement* does not equate to a loss of refugee status.[255] One of the provisions to which paragraph 6 refers to is Article 33 of the Refugee Convention, while the category of persons to whom Paragraph 6 applies is abstained from the benefit of protection under Article 33 (1) of the Refugee Convention. Hailbronner expresses that:

'the explicit reference to Article 33 has to be interpreted as a concession to the increasing overlapping of international refugee law by international human rights law providing for absolute protection against *refoulement* in the case of inhuman or degrading treatment or punishment or torture...It is generally recognised that even if international refugee law will not provide protection under Article 33 (2), international human rights law is still available'.

He states that from paragraph 6, however, no conclusion can be drawn with regard to the application of Article 33 (2) of the Refugee Convention to 'dangerous' refugees. Whether they are entitled to protection against *refoulement* is a matter to be decided under Article 21 (2) of the Directive and Article 33 (2) of the Refugee Convention.[256]

§ 3.3.3.2.1 The notion of 'danger to the security of the Member State'

As previously mentioned the following phrase in Article 14 (4) of the Directive is taken from Article 33 (2) of the Refugee Convention: there should be 'reasonable grounds for regarding a person as a danger to the security of a Member State in which he or she is present or where he or she constitutes a danger to the community of the Member State because of a conviction by a final judgment of a particularly serious crime'.[257] The revocation clause is not

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253 Storey 2008, p. 24

254 Paragraph 6 refers to Articles 3, 4, 16, 22, 31, 32, 33 of the Refugee Convention or provisions which are similar to these.

255 McAdam 2007, p. 15.

256 Hailbronner 2010, p. 1137.

257 Article 33 (2) reads as: 'The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final

the only provision in the Qualification Directive in which the whole phrase or almost similar wordings of the phrase are laid down. Articles 17 (1) (d) and 21 (2), to be dealt with later on, also use this phrasing and as shown in § 3.3.1.1, Article 28 (1) of the Temporary Protection Directive includes a similar description as an exclusion ground.[258]

While Articles 33 (2) of the Refugee Convention and 14 (4) of the Qualification Directive state that there should be 'reasonable grounds for regarding', also 'serious grounds to consider' from Article 1F of the Refugee Convention is used in, *inter alia*, Article 17 (1) of the Qualification Directive. According to Zimmermann & Wennholz, the standard of proof to be used for both is identical.[259] Hailbronner explains that reasonableness means that in an objective evaluation, at the time of making the decision there are facts indicating a probability for a future risk to the security of the state. This means that a reasonable observer would believe that the person constitutes a danger on the basis of information presented.[260]
Regarding the concept of 'danger to the security of the Member State', Article 14 (4) of the Qualification Directive and Article 33 (2) of the Refugee Convention do not further indicate in which cases it may apply. It is generally assumed that states possess a margin of appreciation in this area.[261] Grahl-Madsen explains that acts qualifying as endangering national security can comprise such behaviour as engaging in activities aimed at facilitating the conquest of the country of residence by another state, working to overthrow the government of this country by force or other illegal means, or engaging in activities which are directed against a foreign government, which as a result threatens the government of the country of residence with repercussions of a serious nature. Espionage, sabotage of military installations and terrorist activities are among the acts which are considered to be threats to national security.[262] Within the context of the latter act, recital 37 of the recast Directive prescribes that 'the notion of national security and public order

judgment of a particularly serious crime, constitutes a danger to the community of that country'.

258 Furthermore, Article 8 of the recast Reception Conditions Directive states 'when protection of national security and public order so requires' as a ground for detention and according to Article 31 (8) (j) of the recast Directive on Asylum Procedures, Member States can accelerate an examination procedure when the 'applicant may for serious reasons be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law.

259 Zimmermann & Wennholz 2011, p. 1413.

260 Hailbronner 2010, p. 1135.

261 Lauterpacht & Bethlehem 2003, pp. 89-135.

262 UNHCR, Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37), October 1997, available at <http://www.refworld.org/docid/4785ee9d2.html> (last accessed on 21 September 2015), pp. 235-236.

also covers cases in which a third country national belongs to an association which supports international terrorism or supports such an association.[263] Article 14 (4) is restricted to the security of the Member State in which the person is present. The thoughts on this issue differ among academics. Some believe that an application of the provision would be inappropriate when the threat is directed at another state or the international community generally, while Hathaway, for instance, states that the invocation of a national security argument is appropriate where a refugee's presence or actions give rise to an objectively reasonable, real possibility of directly or indirectly inflicted substantial harm to the host state's most basic interests, including the risk of an armed attack on its territory or its citizens, or the destruction of its democratic institutions.[264] Agreeing with Hathaway, Hailbronner argues that the restriction is hardly in line with the development of the EU as an area of common interests and values which would seem to require that security threats to other Member States would have to be taken into account.[265]

The second sentence of Article 33 (2) of the Refugee Convention, respectively Article 14 (4) of the Qualification Directive concerns cases in which the person constitutes a danger to the community of the Member State because of a conviction by a final judgment of a particularly serious crime. Final judgment refers to the ending of judicial proceedings; appeal rights have expired or have been exhausted. The term 'serious crime' includes acts such as homicide, rape, child molesting, wounding, arson, drugs trafficking and armed robbery. Commentary to Article 33 (2) explains that the use of 'particularly serious' expresses that even when a person has committed a serious crime, *refoulement* is only warranted when account has been taken of all mitigating and other circumstances surrounding the commission of the offence. Finally, the refugee must constitute a danger to the community from which protection is sought. As danger follows from the refugee's criminal character, it does not matter whether the crime was committed in the state of origin or country of asylum. The question whether the person has or has not served a penal sentence or otherwise been punished is not relevant and particularized *refoulement* cannot be based on the refugee's criminal record per se.[266]
Hathaway believes that no additional proportionality requirement has to be met when it is shown that a refugee falls under Article 33 (2) of the Refugee Convention. He states that 'no purely individuated risk of persecution can offset a real threat to such critical security interest of the receiving state' which does not require a balancing test. Other scholars, including Zimmermann &

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263 For more on the issue of terrorism see Zimmermann & Wennholz 2011, p. 1416.
264 See Goodwin-Gill & McAdam 2007, p. 236 et seq.
265 Hailbronner 2010, p. 1135.
266 Hathaway 2005, pp. 349-351.

Wennholz do not agree with this thought, stating that it is at odds with basic principles of human rights protection.[267]

With respect to the discussion on the notion of 'danger to the security of the Member State', alliance can be sought with Articles 27 and 28 of Directive 2004/38 on the free movement of EU citizens and their family members. According to Article 27 (1) of Directive 2004/38, Member States may impose restrictions on the residence of Union citizens and their family members on grounds of public policy, public security or public health. The measures taken on these grounds must be based on the personal conduct of the person concerned and must represent a 'genuine, present and sufficiently threat affecting one of the fundamental interests of society.[268] Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted (Article 27 (2) of Directive 2004/38)'.[269] The ECJ decided in *P.I. v. Oberburgermeisterin der Stadt Remscheid* that this threat 'implies, in general, the existence in the individual concerned of a propensity to act in the same way in the future. Before taking an expulsion decision, the host Member State must take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into that state and the extent of his/her links with the country of origin'.[270]
Article 28 (3) of Directive 2004/38 prescribes that an expulsion decision may not be taken against Union citizens, unless the decision is based on imperative grounds of public security. The Court determined that this provision must be interpreted as meaning that 'it is open to the Member States to regard criminal offences such as those referred to in the second subparagraph of Article 83 (1) TFEU[271] as constituting a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat

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267 Zimmermann & Wennholz 2011, p. 1420 and Hathaway 2005, pp. 353-355.

268 Boeles, Den Heijer, Lodder & Wouters 2009 define this criterion as the 'clear and present danger test'.

269 European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

270 ECJ 22 May 2012, *P.I. v. Oberburgermeisterin der Stadt,* App. No. C-348/09. See also ECJ 11 June 2015, *Zh. And O. v. Staatssecretaris voor Veiligheid en Justitie*, App. No. C-554/13 which concerned the interpretation of the terms 'risk to public policy' in Article 7 (4) of the Returns Directive.

271 These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

to the calm and physical security of the population and thus be covered by the concept of 'imperative grounds of public security', capable of justifying an expulsion measure under Article 28 (3), as long as the manner in which such offences were committed discloses particularly serious characteristics, which is a matter for the referring court to determine on the basis of an individual examination of the specific case before it'.[272]

§ 3.3.3.3 Article 17 of the Directive

The Commission used the similar wording of Article 1F of the Refugee Convention for draft Article 17 of the Directive. In the final version, relevant changes have been implemented which make exclusion from subsidiary protection status broader than the refugee status under the Qualification Directive and the Refugee Convention.[273] A comparison between Articles 12 (2) and 17 (1) of the Qualification Directive shows that subparagraphs (a) and (c) are identical.[274] Article 17 (2) corresponds with Article 12 (3) of the

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[272] See para. 28 of the judgment.

[273] Draft Article 17 (3) and (4) which were similar to draft article 14 (3) and (4) of the original proposal and provided for a judicial remedy and prescribed that the application of the exclusion would not in any manner affect obligations of Member States under international law, were also deleted.

[274] These read respectively as following:
Article 12 (2)
A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:
(a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee, which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.
Article 17 (1)
A third country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:
(a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) he or she has committed a serious crime;
(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;
(d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.

Directive as both state that the exclusion clauses also apply to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.[275] There is firstly a difference between the provisions in Article 12 (2) (b) and Article 17 (1) (b) of the Directive. While the first provision refers to a serious non-political crime, the latter requires the person to have committed a 'serious crime' irrespective of where the crime has been committed. The phrase 'outside the country of refuge prior to this admission as a beneficiary of subsidiary protection status' has been omitted from Article 17 (1) (b) indicating that a serious crime can either be committed before or after the issuance of subsidiary protection status. Whether a crime is considered a 'serious crime' is determined according to the same criteria as applied under Article 1F (b). According to the UNHCR Handbook, within this context a 'serious crime' 'must be a capital crime or a very grave punishable act'. Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1F (b), even if technically they are referred to as 'crimes' in the penal law of the country concerned. Once it can be shown that the act constitutes a 'serious crime', there is no need to determine whether it is a political or non-political crime.[276] Study shows that Member States usually define the notion of a 'serious crime' as referring to the severity of the punishment provided in national criminal codes ranging for crimes where the sentence is longer than three to ten years.[277]

Another difference between the refugee and subsidiary protection exclusion clauses relates to two additional exclusion grounds for subsidiary protection. This first ground concerns Article 17 (1) (d) which excludes a person when 'the person constitutes a danger to the community or the security of the Member State in which he or she is present'. This phrase is not a new phenomenon as it is based on Article 33 (2) of the Refugee Convention and defined as a merger of Article 33 (2) and Article 1F of the Refugee Convention. While the extension of the exclusion clauses for refugees with cases dealt with under Article 33 (2) was rejected by Member States for being untenable with the Refugee Convention and eventually led to the creation of Article 14 (4) of the Directive, the legal objections were not relevant in case of subsidiary protection.[278] This has to do with the lack of an international instrument on subsidiary protection as a result of which, no analogous legal argument could be satisfied with respect to subsidiary protection.[279] The fact that a country

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[275] In the draft provisions of both, the original wording was 'the grounds for exclusion shall be based solely on the personal and knowing conduct of the person concerned'.

[276] McAdam 2005, pp. 495-496.

[277] ECRE, The Impact of the Qualification Directive on International Protection, October 2008, p. 30.

[278] While in case of Article 14 (4), a Member State 'may' terminate the refugee status, Article 17 (1) obliges to exclude when the provision can be applied.

[279] McAdam 2007, p. 23.

excludes an applicant from subsidiary protection does not necessarily mean that the person can be removed. Just as in the case of excluding refugees, Member States have to respect the *non-refoulement* principle under human rights law as prescribed in Article 21 (1) of the Directive. This shows that exclusion from eligibility for subsidiary protection must be distinguished from *refoulement*. The application of Article 17 (1) means in practice that the applicant must either be sent to a safe third country or be allowed to remain in accordance with the prohibition of *refoulement* under, *inter alia,* Article 3 ECHR, but without a residence permit and other rights derived from the subsidiary protection status.[280] Within this context recital 15 of the recast Directive formulates that such persons are allowed to remain in the country but fall outside the scope of the Directive.[281]
Contrary to Article 33 (2) of the Refugee Convention and Article 14 (4) of the Qualification Directive, the phrase 'having been convicted by a final judgment of a particular serious crime' has been left out of the provision. Article 17 (1) (d) only refers to 'a danger to the community or to the security of the Member State in which he or she is present' and requires 'serious reasons for considering' instead of 'reasonable grounds'. Hailbronner states that the standard of proof of Article 33 (2) is thus not applicable; the application of subparagraph d) requires a lower threshold and its scope of application is broader than Article 33 (2) which gives Member States more discretion in applying the provision.[282]

The second additional exclusion ground is prescribed under Article 17 (3) and reads as following:
'Member States may exclude a third country national or a stateless person from being eligible for subsidiary protection, if he or she prior to his or her admission to the Member State has committed one or more crimes, outside the scope of paragraph 1, which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from these crimes'.

Inclusion of this paragraph provides a remedy for preventing the escape of criminal responsibility of persons. However, it is questionable because there is no common agreement of what is meant with 'punishable by imprisonment'.[283]

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[280] Boeles, Den Heijer, Lodder & Wouters 2009, p. 343.
[281] Recital 9 reads in full as following: those third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive.
[282] Hailbronner 2010, pp. 1159-1160.
[283] The ECRE 2008 report on the implementation of the Qualification Directive shows

§ 3.3.3.4 Article 19 of the Directive

Article 19 of the Directive is the equivalent of Article 14 and like this provision it was not included until the Council negotiations. When comparing the provisions, there are some points of agreement and also some differences.[284]

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that for example Hungary and Slovakia require the crime to be punishable in national legislation with at least a 5-year imprisonment term, p. 30.

[284] These read respectively as following:

Article 14

1. Concerning applications for international protection filed after the entry into force of Directive 2004/83/EC, Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body if he or she has ceased to be a refugee in accordance with Article 11.

2. Without prejudice to the duty of the refugee in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his or her disposal, the Member State which has granted refugee status shall, on an individual basis, demonstrate that the person concerned has ceased to be or has never been a refugee in accordance with paragraph 1 of this Article.

3. Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person if, after he or she has been granted refugee status, it is established by the Member State concerned that:

(a) he or she should have been or is excluded from being a refugee in accordance with Article 12;

(b) his or her misrepresentation or omission of facts, including the use of false documents, was decisive for the granting of refugee status.

4. Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when:

(a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;

(b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.

5. In situations described in paragraph 4, Member States may decide not to grant a status to a refugee, where such a decision has not yet been taken.

6. Persons to whom paragraphs 4 or 5 apply are entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31, 32 and 33 of the Geneva Convention in so far as they are present in the Member State.

Article 19

1. Concerning applications for international protection filed after the entry into force of Directive 2004/83/EC, Member States shall revoke, end or refuse to renew the subsidiary protection status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body if he or she has ceased to be eligible for subsidiary protection in accordance with Article 16.

2. Member States may revoke, end or refuse to renew the subsidiary protection status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if after having been granted subsidiary protection status, he or she should have been excluded from being eligible for subsidiary protection in accordance with Article 17(3).

3. Member States shall revoke, end or refuse to renew the subsidiary protection status

Article 19 (1) and (3) correspond to Article 14 (1) and (3) of the Directive as they are also mandatory and oblige Member States to terminate subsidiary protection in the case of cessation, or exclusion in accordance with Article 17 (1) and (2) or misrepresentation or omission of facts which were decisive for granting subsidiary protection. Article 19 (2) provides Member States with the option to revoke, end or renew the subsidiary protection status granted when the person should have been excluded from a status in accordance with Article 17 (3) of the Directive, thus in case of the commission of one or more crimes prior to his or her admission to the Member State. As Hailbronner states, it is a logical conclusion that a person excluded under Article 17 (3) is not entitled to a subsidiary protection status and therefore such a status which has already been granted may be terminated.[285]

Article 19 (4) of the Directive prescribes that the Member State has to demonstrate that the person concerned is not eligible for subsidiary protection on any of the termination grounds. In the case of revocation of refugee status, the Member State has to carry the burden of proof only when it concerns cessation of refugee status in accordance with Article 11 of the Directive while in the case of termination of subsidiary protection status on the exclusion grounds or fraud, the burden of proof of Article 4 (1) of the Qualification Directive applies. Battjes explains that this results in an odd situation where subsidiary protection beneficiaries suspected of fraud or the commissioning of a crime have a better position than recognised Directive refugees do.[286] With regard to Article 19 (4), Noll notes that there are conflicting interests between the applicant's duty to submit all elements needed to substantiate international protection and later procedures for exclusion from subsidiary protection. According to him, the provision must be interpreted in a manner avoiding collisions with the right to remain silent, emanating from human rights law.[287] Article 14 differs from Article 19 because it does not have a paragraph on the resultant rights as under Article 14 (6) of the Directive.

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of a third country national or a stateless person, if:
(a) he or she, after having been granted subsidiary protection status, should have been or is excluded from being eligible for subsidiary protection in accordance with Article 17(1) and (2);
(b) his or her misrepresentation or omission of facts, including the use of false documents, was decisive for the granting of subsidiary protection status.
4. Without prejudice to the duty of the third country national or stateless person in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his or her disposal, the Member State which has granted the subsidiary protection status shall, on an individual basis, demonstrate that the person concerned has ceased to be or is not eligible for subsidiary protection in accordance with paragraphs 1, 2 and 3 of this Article.

285 Hailbronner 2010, p. 1164.

286 Battjes 2006, pp. 268-269.

287 Noll 2005, p. 15.

§ 3.3.3.5 Other relevant provisions concerning exclusion

Article 21 of the Directive has been mentioned a few times already in relation to exclusion of international protection under this Directive. As laid down in paragraph 1 of this provision, Member States have to respect the *non-refoulement* principle in accordance with their international obligations, thus also when it concerns excluded asylum seekers who fall outside the scope of the Directive. This principle is among the objectives of the CEAS and prescribed in, *inter alia*, Article 19 of the EU Charter of Fundamental Rights. Though paragraph 1 is the same as the provision in the Commission proposal[288] and applies both to refugees and subsidiary protection status beneficiaries, two more paragraphs were added during the negotiation process with respect to refugees; paragraph 2 allows Member States to *refoule* a refugee, whether formally recognised or not, on the conditions which are similar to Article 33 (2) of the Refugee Convention and according to paragraph 3, Member States may revoke, end or refuse to renew or to grant a residence permit with regard to a refugee to whom paragraph 2 applies. The UNHCR commented on the fact that paragraph 2 makes no reference to Article 32 of the Refugee Convention. The organisation expresses that Articles 32 and 33 of the Refugee Convention are complementary and that Article 32 should be explicitly reflected in implementing legislation.[289] With regard to the question to whom Article 21 applies, Battjes explains that this provision can only be addressed after status determination. This has to do with the fact that the provisions of the Qualification Directive address the content of the protection granted to persons who qualify for refugee status or subsidiary protection status. The words 'whether formally recognised or not' in paragraph 2 concerns persons who qualify for refugee status in the sense of Article 2 (d) and (13) of the Directive, but to whom the benefits of the Directive may be denied because the grounds for expulsion in Article 33 (2) or 32 (1) of the Refugee Convention apply.[290] It should be mentioned that paragraph 3 refers to the termination of a residence permit and not the refugee status as is the case in Article 14 (4) of the Directive. Refugees whose residence permit is revoked, ended or refused renewal on the basis of Article 21 (3) are residing unlawfully in the state and can be expelled to their

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288 The Commission stated in its Commentary to the Directive that 'In accordance with Articles 32 and 33 of the Geneva Convention, this Article confirms the Member States' obligation not to expel refugees and to respect, in relation to them, the principle of *non-refoulement*. It confirms, in accordance with the ECHR, the same obligation in relation to the victims of torture or inhuman or degrading treatment or punishment. Finally, it requires Member States to not expel the beneficiaries of the other forms of subsidiary protection and to respect, in relation to them, the principle of *non-refoulement* within the same limits laid down in Articles 32 and 33 of the Geneva Convention'.

289 UNHCR Annotated Comments 2005, p. 37.

290 Battjes 2006, p. 309.

country of origin. If they are still present in the Member State, they can make a claim to the benefits under Chapter VII which applies to beneficiaries of refugee status, not residence permit holders.

Within the scope of Article 21 (3), reference must be made to Article 24. This provision states that as soon as their status has been granted, refugees shall receive a residence permit for at least three-years. This permit is renewable unless compelling reasons of national security or public order otherwise require, and without prejudice to Article 21 (3). The refusal of the permit on 'compelling reasons of national security or public order' refers to the grounds stated in Article 32 (1) of the Refugee Convention which has a wider scope than Article 33 (2) of the Refugee Convention on which Article 21 (3) is based.[291] As Battjes explains, 'the grounds for expulsion meant in Article 33 (2) of the Refugee Convention are hence instances of the grounds mentioned in Article 32 of the Refugee Convention, which encompasses yet other cases'. He states that this also results from the wording that those compelling reasons apply 'without prejudice to Article 21 (3)'.
Furthermore, this text confirms that refugees whose permit has been refused on the grounds of security under Article 24 (1) may also make a claim to the benefits under Chapter VII, as this claim requires a status and not a permit. There is no unambiguous answer how this relates to recital 40 of the recast Directive which expresses that Member States may require the prior issue of a residence permit with regard to access to employment, social welfare, health care and access to integration facilities. Battjes believes that if the permit were to function as a condition for the benefits, it should have been laid down in the provisions of the Qualification Directive and not in a Preamble consideration.[292]
The *H.T. v. Land Baden-Würrtemberg* case[293] concerned the interpretation of Article 21 (2) and (3) and Article 24 of the Qualification Directive. The ECJ judged that this Directive must be interpreted as meaning that a residence permit, once granted to a refugee, may be revoked, either pursuant to Article 24 (1), where there are compelling reasons of national security or public order within the meaning of that provision, or pursuant to Article 21 (3), where there are reasons to apply the derogation from the principle of *non-refoulement* laid down in Article 21 (2). According to the Court, support for a terrorist organisation included on the list annexed to Council Common Position 2001/931/CFSP of 27 December 2001 on the application of

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[291] Article 25 of the recast Qualification Directive on the issuance of a travel document to beneficiaries of a refugee or subsidiary protection status knows a similar reference to 'compelling reasons of national security or public order' as prescribed in Article 24 (1) of the Directive.
[292] Battjes 2006, pp. 488-489.
[293] ECJ 24 June 2015, *H.T. v. Land Baden-Würrtemberg*, App. No. C-373/13.

specific measures to combat terrorism, in the version in force at the material date, may constitute one of the 'compelling reasons of national security or public order' within the meaning of Article 24 (1), even if the conditions set out in Article 21 (2) are not met. In order to revoke on the basis of Article 24 (1), the competent authorities are nevertheless obliged to carry out, under the supervision of the national courts, an individual assessment of the specific facts concerning the actions of both of the organisation and the refugee in question. Where a Member State decides to expel a refugee whose residence permit has been revoked, but suspends the implementation of that decision, it is incompatible with that Directive to deny access to the benefits guaranteed by Chapter VII of the same Directive, unless an exception expressly laid down in the Directive applies.

The second part of Article 24 (1) makes it possible for Member States to shorten the validity of residence permits for family members of refugees and refers to Article 23 (1) where it is laid down that states should ensure that family unity can be maintained.[294]

Article 23 of the Directive thus concerns the maintenance of the family unity of family members of beneficiaries of international protection and provides them with a derivative status. According to paragraph 2 of this provision, these family members are entitled to claim the benefits as set out in Articles 24 to 35 of the Directive if they do not individually qualify for a refugee or subsidiary protection status. When a family member of a beneficiary of international protection applies for asylum, it must first be examined whether he or she qualifies for international protection. When this is not the case, family members can still claim full benefits, in accordance with national procedures and as far as is compatible with the personal legal status of the family member. Article 2 (j) of the recast Directive defines who falls under the term 'family member'. It covers spouses, partners in a stable relationship if domestic aliens' law treats unmarried couples in a way comparable to married couples and minor children of beneficiaries of international protection.[295] Furthermore, it is required that the family bond should have already existed in the country of origin and the family member is present in the Member State. Though the term 'family member' is more restricted in comparison to the original draft, Article 23 (5) of the Directive gives Member States the power to extend the group of family members to 'other close relatives who lived together as part of the family at the time of leaving the country of origin, and were wholly or mainly dependent on the beneficiary of refugee or subsidiary protection status at that time'.

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[294] Article 24 (2) of the Qualification Directive concerns subsidiary protection beneficiaries and their family members in which the term for a residence permit is set for a period of at least one year.

[295] Minor children have to be unmarried and dependent and it is not relevant whether they were born in or out of wedlock or adopted as defined under the national law.

Significant within the scope of the exclusion clauses are Articles 23 (3) and (4) of the recast Directive. It is obvious that family members of excluded persons under Articles 12 or 17 of the Qualification Directive cannot invoke the provision on family unity of this Directive as Article 23 (2) states that it concerns the family members of 'the beneficiary of international protection'. If family members themselves are or would be excluded from refugee or subsidiary protection status under the Directive, paragraph 3 obliges Member States not to provide a derivative status to them.[296] As an individual claim of the family member should first be examined before Article 23 comes into the picture, it may be the case that the family member is already excluded. If this is so, paragraph 3 does not fulfill a role anymore. Paragraph 4 lays down that 'notwithstanding paragraphs 1 and 2, Member States may refuse, reduce or withdraw benefits for reasons of national security or public order', which refers to family members who have not been excluded under paragraph 3.

Besides Article 23 of the Qualification Directive, the Family Reunification Directive may fulfill a relevant role for family members of refugees.[297] This Directive is the first legislative instrument on legal migration at EU level and refugees are explicitly stated to fall under the Directive. Alternative kinds of protection such as subsidiary protection and temporary protection do not fall under the term 'refugee' as prescribed in Article 2 (b) of the Family Reunification Directive.[298] The latter Directive should be distinguished from Article 23 as it addresses admission of family members of refugees while Article 23 concerns the situation in which the family member is already present in the Member State.[299] Another important difference between the two is that the primary purpose of the Family Reunification Directive

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296 Article 21 of the Qualification Directive which contains the *non-refoulement* principle is not applicable to family members, which results in the situation that family members who face expulsion must e.g. claim Article 3 ECHR.

297 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Official Journal L 251, 03/10/2003.

298 Hailbronner & Carlitz 2010 express that the explicit reference to the Geneva Convention for the explanation of the term 'refugee' must be interpreted as meaning the Geneva Convention in the way it is interpreted by the Qualification Directive as Member States which are bound by the Family Reunification Directive are also bound by the Qualification Directive, pp. 175-176.

299 The Family Reunification Directives defines 'family reunification' as the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry'. The fact that a 'lawfully' residence of the third country national is required results in that a refugee whose residence permit is refused for compelling reasons of national security or public order under Article 24 (1) of the recast Directive cannot make a claim for family reunification under the Family Reunification Directive.

is to secure respect for Article 8 ECHR, 'respect for family life' while the Qualification Directive does not mention this provision.[300]

In the same manner of Article 23 (4) of the Qualification Directive, the Family Reunification Directives provides in Article 6 that Member States have the option to reject an application to family reunification with family members who present a threat to public policy, security or health.[301] They may withdraw or refuse to renew the family member's residence permit on the same grounds but when doing so, the Member State has to consider 'the severity or type of offence against public policy or public security committed by the family member, or the dangers that are emanating from such person'. Recital 14 of the Family Reunification Directive explains what falls under the terms 'public policy and security': 'the notion of public policy may cover a conviction for committing a serious crime. In this context it has to be noted that the notion of public policy and public security also covers cases in which a third country national belongs to an association which supports terrorism, supports such an association or has extremist aspirations'.[302]
Though Article 6 of the Family Reunification Directive is comparable to the public policy and security clause in Directive 2004/38 on the free movement of EU citizens, Boeles as well as Hailbronner & Carlitz have doubts whether the criterion in Article 27 of the Directive 2004/38, which requires that the measure of public order is based 'exclusively on the personal conduct of the person concerned', applies to family reunification of third country nationals. Both of them refer to the drafting history of Article 6 which suggests that measures under this provision may be based on reasons other than merely the personal conduct; as the original draft did provide a clear reference to the 'clear and present danger test', which was deleted later on.[303] The Commission states in its evaluation report of 2008 that 'recital 14 of the Preamble gives some indication of what might constitute a threat to public policy and public security, but otherwise it is left to Member States to set their standards in line with the general principle of proportionality and Article 17

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300 The recast Directive speaks of 'the right to asylum of applicants for asylum and their accompanying family members' (recital 16 of the recast Directive) and states that 'Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status' (recital 36 of the recast Directive).

301 Paragraph 3 of this provision expresses that 'renewal of the residence permit may not be withheld and removal from the territory may not be ordered by the competent authority of the Member State concerned on the sole ground of illness or disability suffered after the issue of the residence permit'.

302 This corresponds to recital 37 of the recast Directive, except for the last part of 'or has extremist aspirations' which is lacking in recital 37.

303 Boeles, Den Heijer, Lodder & Wouters 2009, pp. 193-194 and Hailbronner & Carlitz 2010, pp. 218-220.

of the Family Reunification Directive'.[304] The latter provision prescribes that in case of rejection, withdrawal or refusal to renew a permit, 'Member States have to take due account of the nature and solidity of the person's family relationships and the duration of the residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin' and thus obliges Member States to make a comprehensive assessment of all the circumstances which may be relevant in a certain case, which is in line with the jurisprudence of the ECtHR concerning Article 8 ECHR.[305] A study on the implementation of the Family Reunification Directive in the EU shows that Member States have used various methods of implementing Article 6.[306] Some States have more or less copied the formulation of Article 6,[307] while in several Member States, membership of an organisation which has 'anti-constitutional' elements or 'extreme ideas' or which supports terrorism is one of the grounds for refusal.[308]

§ 3.3.4 Directive on Asylum Procedures

This Directive is the last one within the first stage of the CEAS and at the same time the one on which Member States had a hard time agreeing on the text. The negotiations of the Commission's amended proposal for the Directive took almost three years due to the fact that countries have considerable differences in administrative frameworks for handling asylum claims and there is a lack of detailed international standards applicable in this field.[309] The aim of the Directive is to establish minimum standards for fair and efficient asylum procedures in Member States. The difference between the Directive on Asylum Procedures and the Qualification Directive is that the first one imposes procedural rules and safeguards for the way an application is examined while the latter imposes, *inter alia*, the criteria for the determination of an application and withdrawal of the status. These Directives are complementary and several provisions of the one Directive refer to the other related provisions in the other Directive.
The Commission explains that the approximation of rules on the procedures for granting and withdrawing refugee status should help to limit the secondary movements of applicants for asylum between Member States, where such movements would be caused by differences in legal frameworks. The Asylum Procedures Directive applies to all asylum claims made in the

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304 Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to Family Reunification, Brussels, 8.10.2008 COM(2008) 610 final, p. 8.
305 Hailbronner & Carlitz 2010, pp. 276-277.
306 See Groenendijk, Fernhout, Van Dam, Van Oers & Strik 2007.
307 Cyprus, Estonia, Greece and Lithuania.
308 Austria, Belgium, Germany and Latvia.
309 Michelogiannaki 2008, p. 22.

territory of EU Member States, including at the border or in transit zones which are based on the Refugee Convention. According to Article 2 (b) of the Directive 'any application for international protection is presumed to be an application for asylum, unless the person concerned explicitly requests another kind of protection that can be applied separately. Furthermore, Member States may decide to apply the Directive in procedures for deciding on applications for any kind of international protection.

Articles 6 to 22 in Chapter 2 of the Directive prescribe the basic principles and guarantees for the asylum procedure. It is relevant to mention Article 7 stating that applicants should be allowed to remain in the Member State pending the examination in first instance with the exception of subsequent applications and cases where the person is surrendered or extradited to another Member State or third country, or an international criminal court or tribunal.[310] The right to stay in the country is not an entitlement to a residence permit. In its 2010 report on the application of this Directive, the Commission states that this right is generally recognised in national legislation and that in a number of Member States, the extradition of an asylum seeker to the country of origin is only possible after a negative decision on the asylum request has been taken.[311] Further, decisions on asylum applications have to be appropriately examined; applicants should be informed in a language they understand and have the right to legal assistance which, under certain circumstances, should be free. Article 18 of the Directive prescribes that Member States should not hold a person in detention for the sole reason that he or she is an applicant for asylum and when the person is detained, the possibility of speedy judicial review has to be provided.
Chapter 3 of the Directive deals with the procedure at first instance. Besides dealing with the normal procedure, it also covers accelerated, inadmissible, unfounded and special procedures.

According to Article 23 (1), applications must be assessed in accordance with the basic principles and guarantees of Chapter 2. Recital 11 of the Directive states that it is in the interest of both Member States and applicants for asylum to decide as soon as possible on asylum applications. Though, six months is prescribed for the examination, Member States are not obligated to decide within this period. However, when this is the case they have to inform the applicant of the delay or set a date when the decision is expected. Based on Article 23 (4) of the Directive, Member States may choose to prioritise or accelerate procedures in several situations. As paragraph 3 of the same provision prescribes that 'any' case may be prioritised or accelerated, the list of situations under paragraph 4 is not exhaustive and contains examples.

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310 Peers & Rogers 2006, p. 368.
311 Brussels, 8.9.2010 COM(2010) 465 final, p. 45.

The Directive does not specify what acceleration is nor does it give a time frame for a decision. It does specify that accelerated procedures must be in accordance with the basic principles and guarantees of Chapter 2.[312]
The Commission and the UNHCR report that national practices with regard to the accelerated procedure are divergent. According to the Commission, the number of grounds set out in national law varies significantly, whereby some depart from the Directive's wording. With respect to exclusion cases, the UNHCR states that applications raising potential exclusion questions are by law in several Member States not exempted from accelerated examination. It found that the law in one state establishes this as a ground for the accelerated examination of an application, but also that determining authorities in some other states thought that in practice, the prescribed time limits for examination would be exceeded if all questions relating to excludability have to be examined in detail.[313] The ground specified under Article 23 (4) (m) is relevant within this framework as it states that a Member State may choose to accelerate the examination when 'the applicant is a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security and public order under national law'.[314] The time limits within which an accelerated examination has to be finished also differs in practice in some Member States. The Commission reports that these vary from 48-hours to three months and some countries have no formal time limits. While in some Member States, the time limits are not binding, in others exceeding the time limits may mean that a certain decision may no longer be issued, such as that the application cannot be rejected as manifestly unfounded.[315]

Articles 25 to 27 of the Directive lay down the rules on inadmissible applications. Member States are not required to examine an asylum application when it falls within one of the situations mentioned in Article 25. One of these circumstances is when the applicant can receive protection in a non-EU State being his first country of asylum. This is a country where the applicant has been granted protection before coming to the EU.[316] Another situation prescribed in Article 25 is the safe third country. In this case, Member States may send applicants to a non-EU State with which the applicant has a connection. The third country is considered to be a safe

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312 A personal interview may be omitted during certain accelerated procedures, see Article 12 (2) (c) of the Asylum Procedures Directive.

313 Improving Asylum Procedures Comparative Analysis and Recommendations For Law and Practice. A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States, March 2010.

314 Recital 12 prescribes that the notion of public order may cover a conviction for committing a serious crime.

315 UNHCR report on the Asylum Procedures Directive, March 2010, p. 55.

316 Article 26 of the Asylum Procedures Directive.

country when it meets the criteria of Article 27. As Boeles summarises; 'these conditions reflect the principles that (1) asylum seekers must in all circumstances be treated in accordance with the Refugee Convention and that (2) the safe third country must respect the principle of *non-refoulement*'.[317] Articles 29-31 of the Directive contain further provisions regarding this concept. The first two paragraphs of Article 29 which enable the Council to adopt a minimum list of third countries which all Member States have to regard as safe countries of origin, has been annulled by the ECJ on the grounds that these two paragraphs grant the Council a legislative power exceeding that provided for by the Treaty. Though the Court annulled the paragraphs on creating a common list, Member States can continue to apply the other substantive provisions on safe countries of origin.[318] The standards as stated in Chapter 2 of the Directive also apply to procedures under Article 25.

Chapter 4 of the Directive deals with the procedures for the withdrawal of a refugee status. An examination to withdraw the status may be started when new elements or findings are available which give cause for reconsidering the refugee status. Article 38 specifies the guarantees for the person concerned during a withdrawal examination in accordance with Article 14 of the Qualification Directive which was discussed in the previous paragraph. Peers & Rogers mention that when withdrawal of status leads to expulsion, the absence of certain procedural rights not mentioned in Article 38 may entail a breach of the general principles of Community law, in light of the jurisprudence of the ECtHR.[319] It is also noteworthy that withdrawal of the refugee status does not affect the protection provided by, for example, Articles 3 and 8 of the ECHR which might stop the expulsion of the person concerned.

The last provision to be discussed is Article 39 which prescribes that Member States shall ensure applicants to have the right to an effective remedy before a court or tribunal.[320] According to the Directive, Member States should provide time limits and other necessary rules to allow the applicant to exercise his right. The question whether the appeal has suspensive effect, is left to the discretion of the Member States, though the rules have to be in accordance with international obligations. UNHCR states that 'these have been established at regional level by the ECtHR, which has held that for a remedy to be effective, Member States must provide for the possibility of suspending removal in cases where it might lead to *refoulement*'. Further,

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317 Boeles, Den Heijer, Lodder & Wouters 2009, pp. 350-351.
318 Spijkerboer & Arbaoui 2010, p. 1293.
319 Peers & Rogers 2006, pp. 407-408.
320 See Reneman 2013.

the ECtHR found that 'the notion of an effective remedy in relation to a claim for international protection requires rigorous scrutiny of an arguable claim, because of the irreversible nature of the harm that might occur. The remedy must be effective in practice as well as in law. It must take the form of a guarantee and not of a mere statement of intent or a practical arrangement, and it must have automatic suspensive effect'.[321] The Commission reports that automatic suspensive effect applies to all appeals lodged with the first tier appellate body in six Member States and that in other Member States applicable exceptions are widely divergent and concern, *inter alia*, decisions falling under Article 23 (3) and (4) of the Asylum Procedures Directive. In some countries removal may be immediately enforced with respect to decisions on subsequent claims or where a person constitutes a danger to public order or national security.[322]

§ 3.3.4.1 Recast Directive on Asylum Procedures

The deadline for transposition of the Directive on Asylum Procedures was 1 December 2007, except for Article 15 regarding legal assistance which had to be transposed a year later. As stated above, the Commission observed that important differences continue to exist between Member States regarding procedural guarantees in asylum procedures and that optional provisions and derogation clauses in the Directive contributed to this situation.[323] The UNHCR and organisations such as the Immigration Law Practitioners' Association had already commented on these points at the time of the Directive's adoption.[324] According to the Commission, the 'Directive lacks the potential to back up adequately the Qualification Directive and ensure a rigorous examination of applications for international protection in line with international and Community obligations of Member States regarding the principle of *non-refoulement*'. As mentioned earlier, together with the Qualification Directive, the Commission presented a proposal for a recast of the Asylum Procedures Directives as well.[325] This recast Directive on Asylum

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321 For more on the right to an effective remedy, see Chapter 4 concerning the discussion on the ECHR.

322 Brussels, 8.9.2010 COM(2010) 465 final, p. 14.

323 Idem, p.15.

324 ILPA Response to the Hague Programme: EU Immigration and Asylum Law and Policy and UNHCR Provisional Comments on the Proposal for European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64) of 10 February 2005.

325 Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast), Brussels, 21.10.2009, COM(2009) 554 final. In 2011, the Commission has also presented a modified proposal for a recast: Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (recast),

Procedures was adopted on the same date as the Reception Conditions Directive.[326] The original Directive remains in force until the 21st of July 2015 which is the date that the recast becomes applicable.

To get a consistent application of the asylum *acquis* and simplifying applicable arrangements, the recast provides for a single procedure in which applications have to be considered in both forms of international protection as set out in the Qualification Directive. Hence, the phrase 'granting and withdrawing refugee status' as prescribed in the title of the Directive has been changed into 'granting and withdrawing international protection' and the words 'international protection' also replace the terms refugee status, refugee and asylum throughout the Directive.[327]
The new recast Directive attaches suspensive effect to an appeal as was already laid down in the proposal for a recast and sets a maximum time limit of twenty-one months for concluding the asylum examination procedure.[328] Within the scope of the exclusion clauses, it should be mentioned that Article 23 (4) (m) of the current Directive was deleted in the proposal for a recast Directive and has been reintroduced in a slightly different form. According to Article 31 (8) (j) of the recast Directive, Member States 'may provide that an examination procedure in accordance with the basic principles and guarantees of Chapter 2 be accelerated and/or conducted at the border or in transit zones when: 'the applicant may *for serious reasons* be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law.[329] Paragraph 9 of the latter provision states that Member States must set reasonable time limits for such cases and may without prejudice to paragraphs 3 and 5 of the same provision be exceeded when this is necessary to ensure an adequate and complete examination of

Brussels, 1.6.2011, COM(2011) 319 final.

326 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

327 Several organisations have commented on the proposal for a recast Directive, among others, UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009); Opinion of the National Red Cross Societies of the Member States of the European Union and the International Federation of Red Cross and Red Crescent Societies, Brussels, 31 May 2010 and ILPA Comments on Commission Proposal for a Directive of the European Parliament and the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast) Com (2009) 554, 21 October 2009.

328 Articles 46 (5) and 31 (5) of the recast Directive on Asylum Procedures respectively.

329 See also ECRE comments on the Amended Commission Proposal to recast the Asylum Procedures Directive (COM(2011) 319 final), September 2011.

the application. In the case of applicants who are detained at borders or in transit zones, states have four weeks to decide on their application. When a decision has not yet been taken, the alien must be granted entry to the territory of the state in order for the application to be processed.[330]
In connection with the binding effect of the Directives which are discussed in the foregoing, this raises the question of judicial protection for third country nationals. The ECJ plays an important role as it is the judicature that has to deal with interpreting the cases on the provisions. The next paragraph will focus on the ECJ's case law on the exclusion clauses.

§ 3.4 The role of the ECJ

The Lisbon Treaty led to several changes within EU law concerning the protection of fundamental rights. Accordingly, the EU Charter of Fundamental Rights which is mainly based on the ECHR is now a legally binding instrument for the EU. The Charter which is part of primary law of the EU sees the Convention as a minimum standard. This follows from Article 52 (3) of the Charter in which is laid down that:
'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

Weiß states that the wording of Article 52 (3) of the Charter does not merely point at an interpretational guideline but is a substantial incorporation of corresponding Convention rights which have become legally binding on the EU institutions.[331]

The importance of the Charter for the alien is that it is directly enforceable in national courts, but only when the case in question involves the application of EU law. It is difficult to take a case directly to the Court of Justice as this Court was not primarily created to deal with individual complaints. Through the preliminary reference procedure, it is up to the national courts to decide whether a question over the meaning of EU legislation will be referred to the Court in Luxembourg. When an alien cannot rely upon the Charter in a case, he can still fall back on the procedural guarantees as laid down in the provisions of the ECHR as states are always obliged to respect the rights and freedoms as guaranteed under the Convention.[332]

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330 Article 43 of the recast Directive on Asylum Procedures.
331 Weiß 2011, pp. 69-73.
332 Background Paper, The EU Charter of Fundamental Rights: What can it do? Open Society European Policy Institute, February 2013. See also Brouwer 2005.

As far as it concerns remedies to the ECJ there are generally two kinds of appeals, namely a direct appeal, mainly through the legality of acts and an indirect appeal through the preliminary references by a domestic court.[333] As in practice the latter is the only way an individual can gain access to the ECJ, I will focus on this procedure. The preliminary reference procedure is laid down in Article 267 TFEU and its purpose is to uniformly interpret and apply EU law in all Member States. A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the ECJ about the interpretation of EU law. The ECJ does not decide the dispute itself but provides a guiding ruling. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised. Though requests for preliminary rulings were initially limited to questions raised by national courts of last instance, this limitation was abolished with the Lisbon Treaty and every court or tribunal is now allowed to request a preliminary ruling.[334] The Treaty has also led to the introduction of paragraph 4 of Article 267 TFEU which prescribes that the ECJ has to decide with the 'minimum of delay' when a requested preliminary ruling concerns a person in custody.[335] Another change involving the Lisbon Treaty and affecting asylum law is that the Court now has full judicial review capacities for provisions as well as organs operating in the Area of Freedom, Security and Justice.

§ 3.4.1 Cases concerning exclusion

Up to now, four cases have been dealt with before the ECJ regarding the exclusion clauses of the EU asylum Directives of which one case indirectly involves Article 12 of the Qualification Directive. In the cases *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal (Hungarian Immigration Service)*[336] and *Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*, the Court gave a preliminary ruling on the interpretation of Article 12 (1) (a).[337] Article 12 (1) corresponds to Article 1D of the Refugee Convention and deals with cessation. This provision falls beyond the scope of this study and will, therefore, not be discussed further.

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333 Carlier 2007, p. 31. For an overview on direct actions see <http://www.pbookshop.com/media/filetype/s/p/1350116239.pdf> (last accessed on 21 September 2015).

334 See Carrera, De Somer & Petkova 2012, for a summary of the ECJ's role after the Lisbon Treaty.

335 In practical terms this paragraph can lead to the application of the urgent preliminary ruling of Article 23a of the Statute and Article 104 (b) of the Rules of Procedures.

336 ECJ 17 June 2010, *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal (Hungarian Immigration Service)*, App. No. C-31/09.

337 ECJ 19 December 2012, *Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*, App. No. C364-11.

The case of *Shepherd*[338] indirectly involved Article 12 (2) as the key point of contention concerned Article 9 (2) (e) of the Qualification Directive. This provision provides that 'acts of persecution' upon which an application for refugee status could rely, include: e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12 (2).

The applicant, a US soldier deployed to Iraq in 2004 as a helicopter maintenance mechanic, left his unit while stationed in Germany and applied for asylum in 2008. In support of his application, he submitted that because of his refusal to perform military service in Iraq, he was at risk of criminal prosecution and that desertion being a serious offence in the US, it affected his life by putting him at risk of social ostracism in his country. Applicant's claim was rejected and on appeal the Bavarian Administrative Court, Munich decided to stay the proceedings before it and request a preliminary ruling.

The referring court asked in essence whether Article 9 (2) (e) of the Qualification Directive must be interpreted as meaning that certain circumstances, relating in particular to the nature of the tasks performed by the soldier concerned, the nature of his refusal to perform military service, the nature of the conflict in question and the nature of the crimes which that conflict is alleged to involve, have a decisive influence in the assessment which must be carried out by the national authorities in order to verify whether a situation such as that at issue in the main proceedings falls within the scope of that provision.

The ECJ stated that with regard to this case, only the reference to 'war crimes' in Article 12 (2) (a) is relevant and clarified that Article 9 (2) (e) could be invoked by all military personnel who are or will be involved with the direct or indirect commission of war crimes within an 'actual conflict'. So as long as the applicant could establish that there was a high likelihood of committing war crimes in Iraq, the mere fact that such acts lay in the future at the time of his decision to leave the army and his mere indirect involvement with such crimes as a helicopter technician would not prevent him from invoking Article 9.[339]
However, in order to establish a high likelihood of the commission of war crimes, the applicant would have to satisfy an extremely high burden of proof. According to the Court, when assessing applicant's submissions, significant

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[338] ECJ 26 February 2015, *Shepherd v. Bundesrepublik Deutschland*, App. No. C-472/13. See also <http://cjicl.org.uk/2015/03/03/many-presumptions-no-guarantees-preliminary-observations-shepherd-c-47213/> (last accessed on 21 September 2015).

[339] Idem, paras. 33-38.

attention should be paid to the fact that the US' actions were backed by a mandate of the UN Security Council, which offers in principle, every guarantee that no war crimes will be committed and that the same applies, in principle, to an operation which gives rise to an international consensus. Accordingly, although the possibility can never be excluded that acts contrary to the very principles of the Charter of the UN will be committed in war operations, the fact that the armed intervention takes place in such a context must be taken into account. Additionally, the existence of domestic US legislation outlawing war crimes renders applicant's claim 'implausible'. Finally, applicant would need to establish that his refusal to perform military services 'constituted the only means by which the applicant could avoid participating in the alleged war crimes'.[340]

The last judgment to discuss is dated 9 November 2010 and the result of five questions asked by the German Federal Administrative Court in two combined cases.[341] It regards a preliminary ruling on the interpretation of the exclusion clauses of Article 12 (2) (b) and (c) of the Qualification Directive and Article 3 of this Directive which allows Member States to introduce or retain more favourable standards than laid down in the Directive.

The parties in the main proceedings are the Federal Republic of Germany, represented by the Federal Office for Migration and Refugees: *the Bundesambt v. B and D*, who are Turkish nationals of Kurdish origin.

The first case concerns B who was a sympathiser of Dev Sol (now DHKP/C) in Turkey during his youth and had supported armed guerrilla warfare in the mountains for a certain period of time. He got arrested in 1995 and sentenced to life imprisonment. In 2001, he was given another life sentence for killing a fellow prisoner: an offence to which he confessed. During a 6-month conditional release for health problems, he fled to Germany. B entered Germany at the end of 2002 and applied for asylum and recognition of refugee status. His application for asylum was rejected as unfounded based on the grounds that B had committed serious non-political crimes. B fell into the second exclusion category as prescribed in the second sentence of Paragraph 51 (3) of the Auslandergesetz *(Law on Entry and Residence of Aliens in Germany)*, subsequently Paragraph 60 (8) of the Aufenthaltsgesetz *(Law on the Residence, Participation in Employment and Integration of Aliens in Germany)* and Paragraph 3 (2), subparagraph 2 of the Asylverfahrensgesetz *(Asylum Procedures Law)* and was also declared eligible

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340 Idem, paras. 41-44.

341 ECJ 9 November 2010, *Bundesrepublik Deutschland v. B & D* case, App. Nos. C-57/09 and C-101/09.

for deportation to Turkey.[342] In appeal, the decision of the Bundesambt was annulled by the administrative court of Gelsenkirchen after which the appeal of the Bundesambt against that decision was dismissed by the higher administrative court of North Rhine-Westphalia. The latter court explained that the exclusion clause of serious non-political crimes, does not only consider crimes committed in the past, but also regards the need to prevent the danger the person can pose to the host state, which makes the application of the clause require an overall assessment of the particular case because of the principle of proportionality. The Bundesambt appealed against this decision before the federal administrative court relying on the second and third exclusion clauses of the second sentence of Paragraph 51 (3) of the Auslandergesetz, nowadays Paragraph 3 (2), subparagraphs 2 and 3 of the Asylverfahrensgesetz, by arguing that these two exclusion clauses do not imply that there must be a danger to the security of the State; nor entail the need for an assessment of proportionality with regard to the particular case.

The second case regards D who had been a guerrilla fighter and senior official of the PKK. Due to political differences with its leadership, he left the PKK in 2000 and since then had been under threat. In 2001, he applied for asylum in Germany, where he was recognised as a refugee on the basis of the national law in force at that time. In 2002, D's refugee status was revoked as according to the Bundesambt, there were serious reasons for considering that D had committed a serious non-political crime outside Germany before his admission to its territory as a refugee and that he had been guilty of acts contrary to the purposes and principles of the UN. The administrative court of Gelsenkirchen annulled the revocation decision and the appeal brought by the Bundesambt was dismissed by the higher administrative court of North Rhine-Westphalia on the same grounds as in the case of B. The Bundesambt appealed this judgment before the federal administrative court on grounds that are analogous to the case of B.

The federal administrative court expresses that though, in both cases the conditions for a refugee status are met, *B and D* will not be recognised as refugees if the exclusion clauses of Article 12 (2) of the Qualification Directive apply. If these persons are excluded on the basis of the latter provision, they would be entitled to their right of asylum under Article 16a of the Grundgesetz *(Constitutional Law)* which does not exclude anyone from

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[342] In 2002, the Terrorismusbekampungsgesetz *(Law on Fighting Terrorism)* entered into force, which resulted into including Article 1F of the Refugee Convention into Paragraph 51 (3) of the Auslandergesetz. This provision is replaced with Paragraph 60 (8) of the Aufenthaltgesetz which with the implementation of the Qualification Directive into German law and replaced by Paragraph 3 (2) of the Asylverfahrensgesetz. The latter provision corresponds to Article 12 (2) and (3) of the Qualification Directive.

that right. Against this background, the following questions are referred to the ECJ:[343]

1) Is membership of an organisation which is on an EU list of terrorist persons, groups and entities in relation to a person who has actively supported the armed struggle waged by that organisation and perhaps had a prominent position within that organisation a cause of serious non-political crime or acts contrary to the purposes and principles of the United Nations within the meaning of Article 12 (2) (b) or (c) of the Qualification Directive?
2) If so, does exclusion from refugee status pursuant to Article 12 (2) (b) or (c) of the Qualification Directive require that the person concerned continues to represent a danger for the host Member State?
3) If question 2 is to be answered in the negative: Is it conditional upon a proportionality test being undertaken in relation to the particular case?
4) If a proportionality test applies, must it be taken into consideration that the person is protected against deportation under Article 3 of the ECHR and is exclusion disproportionate only in exceptional cases having particular characteristics?
5) Is it compatible with Article 3 of the Qualification Directive for a Member State to recognise that a person excluded from refugee status pursuant to Article 12 (2) of the Directive has a right of asylum under its constitutional law?[344]

which the ECJ answered with:

The fact that a person has been a member of an organisation included in an EU list of terrorist groups and that the person has actively supported the armed struggle waged by that organisation does not automatically mean that that person must be excluded from refugee status. This is conditional on an assessment on a case-by-case basis of the specific facts. To be able to apply the exclusion grounds in Article 12 (2) (b) and (c) of the Qualification Directive it must be possible to attribute to the person concerned an individual responsibility for the acts committed by the organisation in question while that person was a member. To do so, the true role played by the person concerned in the perpetration of the acts in question, his position within the organisation, the extent of the knowledge he had or is deemed to have had of its activities, and any pressure to which he was exposed or other factors likely

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[343] Gyulai 2012, p. 38.

[344] With regard to the case of D, question 5 is slightly different: Is it compatible with Article 3 of the Qualification Directive if the foreign national continues to be recognised as having a right of asylum under national constitutional law even if one of the exclusion criteria laid down in Article 12 (2) of the Directive is satisfied and refugee status under Article 14 (3) of the Directive is revoked?

to influence his conduct must be considered. Any authority which finds, in the course of that assessment, that the person concerned has - like D - occupied a prominent position within an organisation which uses terrorist methods is entitled to presume that that person has individual responsibility for acts committed by that organisation during the relevant period. It nevertheless remains necessary to examine all the relevant circumstances before a decision excluding that person from refugee status can be adopted.

Furthermore, the Court explains that representing a danger for the host Member State is not a factor to be taken into consideration under Article 12 (2) of the Qualification Directive which has to do with the fact that clauses (b) and (c) of Article 12 (2) which are based on Article 1F (b) and (c) of the Refugee Convention are intended as a penalty for acts committed in the past. The Court states that Articles 14 (4) (a) and 21 (2) of the Qualification Directive enable the competent authorities to revoke a refugee status or *refoule* a refugee when he/she represents a danger. Exclusion under Article 12 (2) (b) or (c) is not conditional either on an assessment of proportionality in relation to the particular case. When the conclusion is reached that Article 12 (2) applies, the authorities cannot be required to undertake an assessment of proportionality, as this would in fact imply a fresh assessment of the level of seriousness of the acts committed, which it has already undertaken to come to the conclusion that Article 12 (2) applies. According to the Court, the exclusion of a person from refugee status does not imply the adoption of a position on the separate question of whether that person can be deported to his country of origin.
In conclusion, the ECJ expresses that Article 3 of the Qualification Directive must be interpreted as meaning that Member States may grant a right of asylum under their national law to a person who is excluded from refugee status on the basis of Article 12 (2), as long as that other kind of protection does not entail a risk of confusion with the refugee status within the meaning of the Directive.[345] The Court explains that introducing or retaining more favourable standards as prescribed in Article 3 of the Directive is permitted as long as those standards are consistent with the Qualification Directive. This means that Member States cannot introduce provisions on granting refugee status to a person within the meaning of the Directive as that person is excluded on the basis of Article 12 (2). However, applying for another kind of protection, such as a discretionary and goodwill basis or humanitarian reasons, which falls outside the scope of the Directive is not prohibited.

[345] Gyulai, 2012, p. 38-39 and Court of Justice of the European Union, Press Release No 111/10, Luxembourg, 9 November 2010.

§ 3.4.2 UNHCR's statement on the B and D case

The *B and D* case gave cause for the 'Statement on Article 1F' in which UNHCR's interpretation of Article 1F is reiterated. Comments on German practice regarding the exclusion clauses are given and attention is paid to the questions that are presented to the ECJ.[346] In this subparagraph I will focus on UNHCR's responses to the questions asked to the Court. Before dealing with this, it should be mentioned here that a study from the Hungarian Helsinki Committee shows that the *B and D* judgment did not lead to any legislative changes in any of the Member States, but only affected the practices of Germany, which had previously differed from these of other Member States.[347]

The UNHCR states that for exclusion to be applied; individual responsibility must be established in relation to an act covered by Article 1F of the Refugee Convention. Regarding the first question referred to the Court, the UN Refugee Agency believes that the requirement for individual responsibility is critical in cases of alleged membership of an organisation which engages in excludable acts. Such a membership should not automatically lead to exclusion and requires an assessment including a careful review of all specific circumstances of the case. UNHCR comments furthermore that 'the activities of an individual in supporting an organisation designated to be a terrorist organisation does not lead to exclusion merely because of the label 'terrorism', but only if the particular crimes in question constitute excludable acts falling within the scope of Articles 12 (2) (b) or (c) of the Qualification Directive, for which the person concerned carries individual responsibility'. While membership of terrorist organisations or groups should not automatically lead to exclusion, it could nevertheless trigger consideration of the application of the exclusion clauses.[348] In some cases, individual responsibility for excludable acts may arise if membership is voluntary, and when the members of such groups can be reliably and reasonably considered to be individually responsible for terrorist acts falling under the scope of Article 1F. When this is the case, decision makers need to examine each case on its own merits and take into consideration all the relevant facts.[349]

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346 UNHCR Statement on Article 1F of the 1951 Convention, July 2009 <http://www.unhcr.org/4a5edac09.html> (last accessed on 21 September 2015).

347 Gyulai 2012, p. 41.

348 In such cases, the applicant must be given the opportunity to put forward any applicable defence regarding non-involvement or dissociation from any excludable act. If this is provided and there is no serious evidence on hand, the applicant should not no longer be considered a 1F applicant.

349 The UNHCR Statement on Article 1F explains further that 'due regard and caution should be given in particular to the actual activities of the organisation; its structure; the organisation's place and role in the society in which it operates, and its purposes and methods. The individual's role and involvement must also be examined, including

Further comments on the first question are though the association of a person with an organisation which is placed on an international list of terrorist organisations does not automatically lead to exclusion, it can trigger a consideration of the applicability of the exclusion clauses. 'Such lists established by the international community should not generally be treated as reversing the burden of proof, in view of the fact that the evidentiary threshold for inclusion in at least some cases may not meet the standard of proof required for exclusion cases'.[350] The UNHCR and the ECJ agree on the first question. In short, it can be concluded that according to both of them, exclusion cases should be decided on an individual assessment including the specific facts, even if there are strong considerations that the person could fall under the exclusion clauses. They also agree on the second question which is whether exclusion from refugee status pursuant to Article 12 (2) (b) or (c) of the Qualification Directive requires that the person concerned continues to represent a danger for the host Member State? The UNHCR explains in its Statement that: 'the conclusion that exclusion grounds do not require a continuing danger to emanate from the person concerned is clear in relation to Articles 12 (2) (a) and (c) of the Qualification Directive and is based on the distinct conceptual framework of Articles 1F and 33 (2) respectively, since Article 33 (2) does not constitute a ground for exclusion'. Representing a danger to the host state is not included in Article 12 (2) (b) of the Qualification Directive either, as the central purpose of this paragraph is to 'ensure that persons responsible for excludable acts shall not find refuge from prosecution and – if they cannot be returned or extradited – escape prosecution and moreover enjoy refugee status in the host state'.[351]

While answering the third question,[352] the ECJ expressed that no proportionality test is required for exclusion under Article 12 (2) (b) or (c). According to the Court, such a test would mean that the authorities have to make a new assessment of the level of seriousness of the acts committed, which had already taken place at the beginning. The Court assumes that states already take great care in examining whether a certain act falls under an exclusion clause, taking into account all the circumstances of the case. In addition, the application of Article 12 (2) of the Qualification Directive does not say anything on the separate question whether the person can be expelled to his country of origin.

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his or her position in it; his or her personal involvement or substantial contribution to the criminal act in the knowledge that his or her act or omission would facilitate the criminal conduct; his or her ability to influence significantly the activities of the group or organisation; and his or her rank and/or command responsibility'.

350 UNHCR Statement on Article 1F of the 1951 Convention 2009, pp.18-32.

351 Idem, pp. 32-33.

352 The third question reads as follows: Is it conditional upon a proportionality test being undertaken in relation to the particular case?

The UNHCR's view on this matter is the opposite. The organisation is of the opinion that the proportionality principle is an important safeguard in the application of the exclusion clauses given the serious consequences of exclusion for the person concerned. The proportionality test is seen as the last stage of the exclusion analysis and should, according to the UNHCR, also be applied in cases where other guarantees, such as protection under Article 3 of the ECHR, could apply. The Statement lays down that: 'in reaching a decision on exclusion, it is necessary to weigh the degree and the likelihood of persecution feared against the seriousness of the acts committed. In this context, the fact that there is another effective and accessible form of protection against removal, without the rights attached to refugee status, is a relevant consideration in the exclusion assessment'. Whether other forms of protection can be taken into account depends on the procedural safeguards and arrangements in the relevant state. The UNHCR explains that when a decision on exclusion is taken in an asylum procedure and the question on protection against removal comes after the asylum procedure is concluded, it is not possible to include the availability of protection in the exclusion assessment.[353] In relation to this issue, the UNHCR Background Note prescribes that, state practice is not uniform as there are courts in some states that reject such an approach, generally in the knowledge that other human rights protection mechanisms will apply to the individual, while others take account of proportionality considerations.[354] Cases concerning excludable acts which are so grave, including crimes against peace, crimes against humanity and acts contrary to the purposes and principles of the UN will not be found to be disproportionate while serious non-political crimes and war crimes can involve a wider range of misconduct and thus leave more scope for considering all interests.

Though the Court believes that the application of the exclusion clauses is unrelated to protection against removal, Advocate General Mengozzi supports the arguments of the UNHCR in his opinion and goes even a step further.[355] He makes a distinction between balancing the seriousness of the conduct against the consequences of exclusion, on the one hand and applying the principle of proportionality, on the other. As regards the first element Mengozzi explains that:
'for the purposes of applying Article 12 (2) (b) and (c) of Directive 2004/83/EC, the competent authorities or the courts of the Member States seized of an application for recognition of refugee status must balance the seriousness of the conduct justifying exclusion from refugee status against the consequences of such exclusion. In the course of that appraisal, account

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353 Idem, p. 34.
354 UNHCR Background Note 2006, para. 76.
355 Opinion of Advocate General Mengozzi delivered on 1 June 2010.

must be taken of the fact that the applicant is entitled, on a different basis, to effective protection against *refoulement*. Where that protection is available and accessible in practice, the applicant will have to be excluded from refugee status, which entails a range of rights which go above and beyond protection against *refoulement*; if, on the other hand, recognition of refugee status is the only way of preventing the applicant's forcible return to a country where he has serious grounds for fearing that – for reasons of race, religion, nationality, adherence to a particular social group or political opinion – he will be subject to persecution likely to endanger his life or physical integrity or to inhuman or degrading treatment, it will not be possible to declare that that person is excluded from refugee status. In the case of exceptionally serious crimes, that balancing exercise is not permissible'.[356]

While the UNHCR expresses that another form of protection against removal is a relevant consideration in the exclusion assessment, the Advocate General explicitly states that a person should not be excluded from a refugee status when that would lead to removal as no other protection is available, except for exceptionally serious crimes. As already shown above, it is not always possible to include the availability of protection in the exclusion assessment, as it occurs in some countries that the question on protection against removal comes after the asylum procedure is closed. The last question referred to the Court, relates to this situation. It concerned whether it is reconcilable with Article 3 of the Qualification Directive for an asylum seeker to obtain an asylum status under national constitutional law despite the application of Article 12 (2) of the Qualification Directive?

According to the UNHCR, an exemption from the exclusion clauses cannot be justified based on Article 3 of the Directive which is similar to what the Court stated. Furthermore, the organisation explains that: 'if the status granted is identical or very similar, whether granted under national constitutional law or as refugee status in the sense of the Qualification Directive, it would simply result in applying a different legal regime to the provision to those of the same form of protection. This could result in granting refuge protection to those who are undeserving of it. The legal consequences of the obligation to apply the exclusion clauses in a manner consistent with the Refugee Convention may not be circumvented simply by applying a different label

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[356] With respect to the element on the proportionality, Mengozzi states that: 'it is my view that the competent authorities and the courts of the Member States must ensure that points (b) and (c) of Article 12 (2) of Directive 2004/83 are applied in a manner proportionate to its objective and, more generally, to the humanitarian nature of the law on refugees. In essence, this means that the process of verifying whether the conditions for the application of those points are met must include an overall assessment of all the circumstances of the individual case'.

to an identical or largely identical status'.[357] When the UNHCR's response is compared with the judgment of the Court, it leads to the same outcome. The Court believes that states can provide another kind of protection; insofar it does not entail a risk of getting confused with refugee status under the Directive. Likewise, the UNHCR does not say that an excluded person cannot get another status under national law; the objection concerns a form of protection which would in the end be very similar to a refugee status under the Directive. Though the Court and UNHCR use different wordings, they eventually mean the same.

§ 3.5 Commentary and conclusion

The diversity of national asylum legislation and practices among Member States which is considered to be one of the main factors affecting asylum flows led to action. At Tampere, the European Council decided to work towards a Common European Asylum System with the aim of harmonising Member States' legal frameworks on the basis of common minimum standards. The first stage of the CEAS resulted in the adoption of four Directives of which the Qualification Directive, containing the substantive criteria for international protection, forms the central piece of the current *acquis*. Following the Hague Programme, evaluation of the adopted instruments showed shortcomings and it became clear that a further harmonisation was necessary. To achieve higher and more harmonised protection standards, the Commission adopted proposals to amend the Directives which are by now adopted recasts. In the recasts, the reference to adopt measures for minimum standards changed into common procedures and a uniform status of asylum. Developing common standards in the states should, *inter alia*, reduce secondary movements as is aimed by the asylum law Directives. The objective is that similar cases should be treated alike and lead to the same outcome in all Member States.

As prescribed in the Tampere Conclusions and expressed in the Directives, the CEAS should be based on the full and inclusive application of the Refugee Convention. The Qualification Directive has included in its Preamble that the Convention is the corner stone of the international regime for the protection of refugees and that the Directive aims to lay down standards to guide the Member States in the application of the Convention, thus provide for a uniform application. A look at the provisions in the Directives on exclusion shows that EU legislation goes further than Article 1F of the Refugee Convention. This means that additional grounds to Article 1F have been laid down and revocation clauses have been introduced which the Refugee Convention does not provide for. One of these exclusion grounds is a copy of the text of Article 33 (2) of the Refugee Convention which states that

[357] UNHCR Statement on Article 1F of the 1951 Convention 2009, p. 35.

there are 'reasonable grounds for regarding a person as a danger to the host Member State or that the person having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the host Member State'. Another extra ground that Article 1F does not contain is that exclusion applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein. With regard to exclusion from subsidiary protection, Member States are given even more power such as in Article 17 (3) of the Qualification Directive which prescribes that 'Member States may exclude a third country national or a stateless person, if the person prior to his or her admission to the state has committed one or more crimes, which would be punishable by imprisonment, had they been committed in the Member State concerned, and if the person left the country of origin solely in order to avoid sanctions resulting from these crimes'.

There are two remarks that I want to make on this matter of which the first concerns the following. While it is explicitly stated and recognised by the EU that the Refugee Convention is the main instrument concerning international refugee protection to be followed, the exclusion clauses in the Directives substantially differ from Article 1F. The UNHCR has repeatedly propounded that the exclusion grounds of Article 1F are exhaustively enumerated and though the grounds are subject to interpretation, they cannot be expanded in the absence of an agreement by all State Parties to the Convention. Bearing this in mind, the EU still chose to give Member States more possibilities to take action against the third country national. Furthermore, another question on this issue is how this commensurates with the objective that similar cases should be treated equally in all Member States and result in reducing secondary movements. Current practices in Member States show differences in the application of Article 1F. By providing optional exclusion and revocation clauses it is difficult to develop common standards as states will deal with these clauses to an even greater extent at their discretion which should be avoided regarding such a sore subject as exclusion.
As mentioned earlier, the text of Article 33 (2) of the Refugee Convention is included in a few provisions as an exclusion and revocation clause.[358] The UNHCR has explicitly stated that Article 33 (2) should be distinguished from Article 1F, as this provision deals with the treatment of refugees and defines the circumstances under which they could nonetheless be *refouled*. It concerns crimes committed in the country of refuge and aims at protecting the safety of the country or community. I question whether including Article 33 (2) of the Refugee Convention as an exclusion clause was necessary as Article 72 of the TFEU also provides states with the authority to make public order

[358] This ground is included among others in Article 28 (1) of the Temporary Protection Directive and Articles 14 (4) and 17 (1) (d) of the Qualification Directive.

exceptions regarding the entry and residence of third country nationals. This means that if the text in Article 33 (2) were to be omitted from the provisions on exclusion, states would still have options to deal with persons who pose a danger to the community and the Qualification Directive would be more in line with the Refugee Convention as is intended. The insertion of Article 33 (2) into the revocation clauses of Articles 14 and 19 of the Qualification Directive is contrary to the concepts of cancellation and revocation as is also criticised by the UNHCR. A status can be cancelled when it has been established that the person should never have been recognised, including cases where he or she should have been excluded from protection. Posing a danger to the community as prescribed in Article 33 (2) is unrelated to not meeting the eligibility criteria for a refugee status at time of RSD. Though revocation plays an important part when the refugee conducts criminal behaviour in the country of refuge, within the scope of the exclusion clauses, this should concern acts which fall under Article 1F (a) and (c).[359] However, such acts do not necessarily have to lead to revocation. One of the findings of the Commission on the implementation of the Qualification Directive was that when a permanent residence permit is issued to a refugee, termination of status is restricted or prevented in some Member States, despite fulfilling the conditions for exclusion.[360] From a practical viewpoint, it is not illogical that states choose to act this way. Taking back the status of a refugee who has already resided in the country of refuge for already a long period of time and who has integrated into the society, will lead to far-reaching consequences for the person concerned. On the other hand, this situation also causes difficulties for the state which is at the end burdened with a person who probably cannot be expelled to his country of origin due to the *non-refoulement* principle, and who does not have the right to stay either. Considering this, it is more reasonable that crimes committed in the country of refuge should be dealt with in accordance with the national criminal law legislation of the country concerned instead of leading to loss or revocation of status, with the exception of the worst offences which could be placed under Article 1F (a) or (c).

My second point deals with Article 17 of the Qualification Directive. The discussion of this provision showed that the exclusion clauses for subsidiary protection are broader than those for refugee status.[361] Recast Qualification Directive prescribes in recital 39 of its Preamble that:

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359 UNHCR Note on the Cancellation of Refugee Status, 22 November 2004.

360 Report from the Commission tot the European Parliament and the Council on the application of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection, 2010, p. 10.

361 For a discussion on the revocation clauses of Articles 14 and 19 of the Qualification Directive see § 3.3.3.4.

'while responding to the call of the Stockholm Programme for the establishment of a uniform status for refugees or for persons eligible for subsidiary protection, and with the exception of derogations which are necessary and objectively justified, beneficiaries of subsidiary protection status should be granted the same rights and benefits as those enjoyed by refugees under this Directive, and should be subject to the same conditions of eligibility'.

Within this scope, several provisions of the Qualification Directive that contained distinctions regarding the two categories of protection have been deleted. No changes have been made to the exclusion provisions. If one chooses to develop a uniform status and the same conditions of eligibility for both, I question why no similar treatment is provided for exclusion of a refugee or subsidiary protection status. Similar exclusion grounds will help to simplify and streamline procedures and reduce administrative costs as is eventually the aim. Currently, there are three differences between Articles 12 and 17 of the Qualification Directive. The first one concerns Article 17 (1) (b) which requires that a serious crime is committed instead of a serious non-political crime outside the country of refuge as prescribed in Article 12 (2) (b). Article 17 (1) (d) and (3) are grounds which are not contained in Article 12. Article 17 (1) (d) excludes a person when he or she constitutes a danger to the community or security of the Member State in which he or she is present. Based on what is explained regarding Article 33 (2) of the Refugee Convention, this clause can and should be omitted. Article 17 (3), which is stated above, is vague and will lead to several interpretations. In the first instance, it is not clear what is meant by 'punishable by imprisonment' as states have different perspectives on this issue. Another question on this ground is whether states will actually apply it. The Commission evaluation report of 2010 showed that the clause was transposed by only thirteen Member States.[362] I believe 'outside the country of refuge' could be added to Article 17 (1) (b) in order to bring it in line with Article 12 (2) (b) and delete Article 17 (3) entirely. In view of the application of the broadened exclusion grounds in practice, it can be said that they are of minor significance. Bringing them in line with Article 12 will lead to more consistency and provide a clear guidance for Member States.

In connection with the binding effect of the Directives, it raises the question of judicial protection for third country nationals. The ECJ plays an important role as it is the judicature that has to deal interpreting the

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[362] Report from the Commission to the European Parliament and the Council on the application of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection, 2010, p. 9.

cases on the provisions. The Court has underlined in the *B and D case* the importance of interpreting EU *acquis* provisions on asylum in line with the relevant provisions of the Refugee Convention and though the Court and the UNHCR have by and large the same thoughts on the issues which were under discussion in this case,[363] they vary on one relevant point, namely whether a proportionality test should be undertaken. There is agreement on the fact that certain egregious behaviour which leads to exclusion is not disproportionate. The problem is that the UNHCR believes that with regard to acts falling under war crimes and serious non-political crimes which can involve a wider range of misconduct, the seriousness of the crime has to be weighed against the consequences of exclusion including the consideration of other forms of protection against removal. Whereas the Court is of the opposite opinion which is that an overall assessment already happens in the first place and sees the expulsion of a person as a separate issue that is unrelated to the question whether an act falls under the exclusion clauses. Despite the difference in notion on the moment when, it should be emphasised in the end, that both allow states to provide another kind of protection to the excluded person. Current state practice on the issue of proportionality is not uniform as there are courts in some states that reject such an approach, while others do take proportionality considerations into account. From the Court's judgment in the cases of *B and D* it shows that many courts have also made rulings reflecting their opposition to proportionality, while other states are in favour of it.[364] It is certain that this matter is not something on which states will reach agreement upon soon. The fact that the Court and the UNHCR differ on this topic is not conducive to conformity either, and raises the question how these accounts relate to each other in the light of the Preamble of the Qualification Directive that prescribes that, consultations with the UNHCR may provide valuable guidance for Member States when determining refugee status on the one hand, and that the objective of EU harmonisation is to guide the competent national bodies of Member States in the application of the Refugee Convention, on the other'. It is for the future to show to what extent the Court's interpretation of the provisions of EU asylum Directives will differ from the UNHCR's. For now it can be concluded that bringing States' practices in line on this matter is difficult as those that reject a proportionality test will side with the EU Court, while the few states in favour will support the UNHCR's view.

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[363] With regard to the additional exclusion ground of posing a 'threat to the national security' the Court clearly confirms in the *B and D case* what the UNHCR has already pleaded, namely that being a danger for the host state is not a condition for exclusion and should not be considered in the context of exclusion.

[364] Of the interveners, the French, German, UK and the Netherlands governments are opposed to a proportionality test, while the Swedish Government and the Commission are in favour of it.

Chapter 4 The ECHR in respect of excluded asylum seekers

§ 4.1 Introduction

As discussed in the previous chapter, the ECJ as well as the UNHCR express that states can provide protection to excluded asylum seekers, but that this protection should be different than a refugee status under the Qualification Directive and Refugee Convention. When one thinks about 'other kind of protection', firstly the ECHR crosses one's mind. There are many situations which fall outside the scope of the Refugee Convention, but are protected by the ECHR and while EU protection for asylum seekers started to develop from 1999 on, the ECHR proves to be an important instrument for aliens and asylum seekers in particular, for already a longer period of time.[365] The ECHR is of great importance to the EU as its Charter is mainly based on this Convention and the ECJ regularly refers to the ECHR and the ECtHR's case law.[366] The other way around, the Strasbourg Court is also being influenced by EU legislation and jurisprudence.[367] The relevant EU asylum law is dealt with in Chapter 3 and now it is time to concentrate on the Council of Europe's ECHR. This chapter will particularly focus on some relevant provisions of this Convention which are related to the application of the exclusion clauses.[368] As each of the Convention provisions viewed apart is

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365 Kamminga 2010, pp. 693-699.

366 EU accession to the ECHR has been discussed since the late 1970s and is seen as a major step in enhancing coherence in human rights protection in Europe. Though things have come a long way, the accession has currently been delay as the ECJ has ruled that the Draft Agreement on the accession is not compatible with EU law. The Court expressed amongst others that the approach adopted in the Draft Agreement, which is to treat the EU as a state and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU and that when the ECHR would form an integral part of EU law, the mechanism established by that protocol could affect the autonomy and effectiveness of the preliminary ruling procedure provided for by the TFEU. The question is what will happen next: would the ECJ eventually agree on perhaps a revised Agreement? It is still to be seen how long the proceedings will take as the Agreement is also to be unanimously approved by the Council and Member States in accordance with their own respective national laws and ratification by all parties to the ECHR. There is thus a risk that one Member State may block the entire accession process for a long period of time.

367 Lawson 2010, pp. 783-796.

368 The ECHR provisions which are discussed under this Chapter are the most relevant ones in connection to an excluded alien. However, it should be noted that also other Convention provisions can play a role in proceedings.

worthwhile conducting a study on, the intention is not to elaborate on them. With a view to understanding their role for an excluded asylum seeker, only brief outlines will be given on their substance.
The first provision to be dealt with is Article 3. When all domestic remedies have been exhausted, the ECtHR can be a last option to prevent or suspend the removal of an excluded person to the country of origin on the basis of the *refoulement* prohibition and thus provide protection in that sense. After dealing with the terms of Article 3, I will discuss the applicability of the provision on removal cases, in particular in relation to excluded asylum seekers. Furthermore, the provision will be examined from the perspective of the consequences of a limbo situation in which excluded asylum seekers are not given a legal stay in the host country and not removed either. Another provision which plays a role within the context of 'other kind of protection' is Article 8 of the ECHR on the right to family life.[369] The right to family life is often invoked by the excluded asylum seeker to regularise his stay in the Netherlands. In case of expulsion, the provision is appealed to when the spouse and children did receive a permit and removal of the alien would lead to separation of the family or other way around. Besides Articles 3 and 8, also Articles 5 and 13 ECHR (right to an effective remedy) will be reviewed in this chapter. According to Article 5, no one shall be deprived of his liberty, except under certain circumstances, such as when action against a person is being taken with a view to deportation or extradition which often occurs in the case of excluded person to be removed. In conclusion, case law from the ECtHR concerning 1F applicants will be discussed.

§ 4.2 Prohibition of *refoulement*

When Article 1F of the Refugee Convention applies to an asylum seeker, states have the right to remove the person from their territory. However, when expulsion would breach the *non-refoulement* principle, according to which an alien cannot be removed to a country where his life or freedom would be threatened, the state cannot proceed with it.[370] The prohibition of *refoulement* is laid down in several human rights instruments. In EU perspective, the Qualification Directive (Article 21), Returns Directive (Article 5) and also the EU Charter of Fundamental Rights (Articles 4 and 19 (2)) include the principle. Article 33 (1) of the Refugee Convention was already mentioned in the previous chapters. This provision contains an explicit prohibition to return a 'refugee' to the frontiers of territories where he would fear for his life on account of one of the grounds for persecution.

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369 This provision finds its equivalent in Article 7 of the EU Charter on Fundamental Rights.

370 With the *M.S.S. v. Belgium and Greece* judgment which is discussed under § 4.3.4, the Court showed for the first time that *refoulement* can also refer to the situation that a person is left in destitution and poverty.

As this provision concerns those who are granted protection, it cannot apply on those against whom Article 1F is held and is thus of no significance for these aliens. Another explicit prohibition is prescribed in Article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Convention against Torture) which states that no return of a person to another state should take place where there are substantial grounds for believing that he would be in danger of being subjected to torture. Besides these explicitly indicated prohibitions, there are other provisions which implicitly indicate the *non-refoulement* obligation. By prohibiting torture, inhuman or degrading treatment or punishment, Article 3 ECHR and its equivalent in Article 7 of the International Covenant on Civil and Political Rights impose states not to *refoule* a person to a country where his life would be in danger.[371] When the various *non-refoulement* provisions mentioned in the human rights treaties are compared with each other, there is no doubt that Article 3 ECHR is the one that is most often invoked for complementary protection which has to do with its absolute character and the fact that the ECHR's enforcement mechanism, contrary to the other treaties, gives binding judgments. Besides its binding judgments, the ECtHR also has the power to issue interim measures. These are urgent measures which only apply where there is an imminent risk of irreparable harm. In the majority of cases, they consist in a suspension of an expulsion or an extradition for as long as the application is being examined.[372]

Collective expulsion of aliens is prohibited by Article 4 of the 4th Protocol to the ECHR and an individual assessment for each person has to take place.[373] There are four situations in which the expulsion of an alien can raise a problem under Article 3 ECHR by way of its direct mental and physical effects.[374] These are in cases of successive expulsion of a person, especially when the alien risks to being sent to an unsafe country; where an alien is to be expelled but does not have the physical condition to travel; the manner in which an expulsion is carried out and, when a removal takes place to a country where there are substantial grounds to believe that the person would

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371 Article 2 ECHR which prescribes a person's right to life is also an implicit *refoulement* provision. Besides the mentioned provisions, also *refoulement* prohibitions are provided in Article 2 (3) of the OAU Convention governing specific aspects of Refugee Problems in Africa, Article 22 (8) of the American Convention on Human Rights, Article 5 (2) of the American Convention and Article 5 of the African Charter on Human and Peoples' Rights. See Wouters 2009 for an extensive study on the prohibitions of *refoulement*.

372 <http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf> (last accessed on 21 September 2015).

373 Also the EU Charter of Fundamental Rights prohibits collective expulsions (see Article 19 (1)).

374 Lambert 2006, pp. 28-33.

face a real risk of being subjected to treatment breaching Article 3. The latter situation happens the most and is therefore the one on which I will focus in the following. Article 3 ECHR is a provision on which much research has been conducted and extensive literature and case law is available. As already stated, with a view to understanding this provision within the scope of this study, I will only briefly discuss the substance and focus on its relevance on expulsion cases of aliens to whom Article 1F applies.

§ 4.2.1 Applicability on removal cases

The first case in which the ECtHR dealt with the question of applicability of Article 3 ECHR on removal was *Soering v. UK* which concerned an extradition case.[375] The Court stated that the existence of other international instruments, which particularly refer to the question of returning persons to a country where they risk being subjected to torture or inhuman or degrading treatment or punishment, could not 'absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction'. Furthermore, 'the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country'. In the *Cruz Varas*[376] and *Vilvarajah*[377] cases, the Court ruled that the principle as pronounced in *Soering* was also applicable to expulsion measures.

As already stated, Article 3 is an absolute right. This means that it makes no provision for exceptions and derogation is not even permitted in the event of a public emergency that threatens the life of the nation. Though governments put forward arguments to the contrary, the ECtHR has repeatedly underlined in expulsion cases that Article 3 prohibits in absolute terms expulsion to face a real risk of torture or inhuman or degrading treatment or punishment and that it guarantees protection, irrespective of the context and conduct of the risk. In the *Chahal* case, in which the UK wanted to expel a Sikh separatist to India, arguing that he had been involved in terrorist activities and posed a risk to the national security of the country, the Court said that 'Article 3 enshrines one of the most fundamental values of democratic society. Though the Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence,

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375 ECtHR 7 July 1989, *Soering v. the UK*, App. No. 14038/88.

376 ECtHR 20 March 1991, *Cruz Varas and others v. Sweden*, App. No. 5576/89.

377 ECtHR 30 October 1991, *Vilvarajah and others v. the UK*, App. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87.

even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct'.[378]

The Court's judgment in *Chahal* has been reaffirmed in the *Saadi* case which concerned a Tunisian applicant also prosecuted for involvement in terrorist activities who complained to risk ill-treatment when returned to Tunisia. In *Saadi*, the UK government intervened as a third party aiming the ECtHR to alter and clarify the approach followed in *refoulement* cases under Article 3 concerning the threat created by international terrorism. One of the arguments put forward by the UK government and supported by the respondent country Italy, was that the threat presented by the person to be expelled should be a factor to be assessed in relation to the possibility and nature of the possible ill-treatment, thus to take into consideration all the particular circumstances of each case and weigh the protection assigned to the application on the basis of Article 3 against the protection of the community. The Court explained that this argument based on the 'balancing of the risk of harm if the person is sent back against the dangerousness he represents to the community if not sent back is misconceived'. According to the Court, 'it would be incorrect to require a higher standard of proof where the person is considered to represent a serious danger to the community as the level of risk is independent of such a test'.[379]

Two more recent cases in which the same issues as in *Saadi* were raised and in which the Court reiterated that the prohibition of ill-treatment under Article 3 is absolute are *Ramzy v. the Netherlands* and *A. v. the Netherlands*.[380] In both of the cases the applicants unsuccessfully applied for asylum; were suspected of belonging to a criminal organisation and eventually acquitted of all charges. Exclusion orders *(Ongewenstverklaring)* were imposed on both applicants as the Dutch Immigration Services found them to represent a danger to national security. Similar arguments as in *Saadi* which were brought up by the four intervening governments, including the UK again, did not lead to any change in the Court's interpretation of Article 3 ECHR which accordingly led to the conclusion that A's expulsion to his country of origin would breach this provision. With regard to the *Ramzy* case, the Court decided that the applicant had lost interest in pursuing his application and stroke out the case. This had to do with the fact that Mr Ramzy's legal representatives did not know his whereabouts and could not answer the Court's questions.

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[378] ECtHR 15 November 1996, *Chahal v. the UK*, App. No. 22414/93, para. 79.

[379] ECtHR 28 February 2008, *Saadi v. Italy*, App. No. 37201/06 [GC] (Ars Aequi RV20080001 includes annotation from R. Fernhout).

[380] ECtHR judgments of 20 October, App. No. 25424/05 and 20 July 2010, App. No. 4900/06 (JV 2010/118).

The ECtHR's case law is clear about the role of Article 3 in removal cases: no limitations or interferences are allowed when an alien could be subjected to *refoulement*. Though this provision is formulated in absolute terms, still certain requirements have to be fulfilled for its application on a case. First of all, 'substantial grounds' must be shown for believing that the person would face a 'real risk' of ill-treatment in the receiving country. In addition, ill-treatment 'must attain a minimum level of severity' in order to fall under the provision. The Council of Europe's Committee for the Prevention of Torture (CPT),[381] uses the term ill-treatment for acts that qualify as torture or as inhuman or degrading treatment. In this study, the term will be used in a similar way referring to these acts as prohibited under Article 3 ECHR.

§ 4.2.2 The terms of Article 3 ECHR

As stated above, the applicant must prove, i.e. show substantial grounds that he faces a real risk of being subjected to ill-treatment if he were returned to the country of destination. Meeting the requirement of a real risk means that in determining whether expulsion would constitute a violation of Article 3, an assessment of the likelihood or probability that ill-treatment will occur must be made.[382] For such an assessment, the Court requires a high degree of proof, especially in cases regarding national security or protection of the public good.[383] The Court considers all relevant evidence, thus both the general situation in the country of origin and the individual situation of the applicant. In the *Vilvarajah* case, the Court ruled that the mere possibility of ill-treatment is not sufficient and the person needs to be singled out from a situation of general violence. This case concerned five Tamils whose asylum applications had been rejected and three applicants who claimed that they would be subjected to ill-treatment if they returned to Sri Lanka. The Court found that the evidence did not show that the applicants' position was any worse than the generality of other members of the Tamil community. According to the Court, 'there existed no special distinguishing features in their cases that could or should have enabled the UK government to foresee that they would be treated in this way'. It is clear that the Court finds the individual situation of the applicant to be very important for its risk assessment. However, 'this requirement has not been phrased by the Court as a general, doctrinal requirement but as the application of the real risk test in the context of some specific cases. At the heart of the Court's test is foreseeability, not individualisation per se'.[384] Where it is relevant to do so,

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381 In full: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

382 The European Convention on Human Rights and the Protection of Refugees, Asylum Seekers and Displaced Persons, UNHCR 1995, European Series, p. 16.

383 Lambert 2006, p. 28.

384 Spijkerboer 2004.

the Court will have regard to whether there is a general situation of violence in the country of destination. In the *NA. v. the UK* case[385] which also concerns a Tamil who was facing expulsion to Sri Lanka, the Court considered its earlier decision in *Vilvarajah* and emphasised that the assessment of whether there is a real risk of ill-treatment must be made on the basis of all relevant factors. In its view, due regard should also be given to the possibility that a number of individual factors may not, when considered separately, constitute a real risk; but when taken cumulatively and when considered in a situation of general violence and heightened security, the same factors may give rise to a real risk. Both the need to consider all relevant factors cumulatively and the need to give appropriate weight to the general situation in the country of destination derive from the obligation to consider all the relevant circumstances of the case.[386] With regard to the situation of the applicant, the Court took note of the current climate of general violence in Sri Lanka and found that there were substantial grounds for finding that he would be of interest to the Sri Lankan authorities in their efforts to combat the Tigers which would lead to a breach of Article 3 if the applicant were to be returned.

Following the *NA.* case, the sole question for the Court to consider is whether, in all the circumstances of the case before it, substantial grounds have been shown for believing that the person concerned, if returned, would face a real risk of being subjected to treatment contrary to Article 3 of the Convention. If such a risk exists and is established, the applicant's removal would necessarily breach Article 3, regardless of whether the risk emanates from a general situation of violence, a personal characteristic of the applicant, or a combination of the two. However, it is clear that not every situation of general violence will give rise to such a risk.[387] On the contrary, the Court has made clear that a general situation of violence would only be of sufficient intensity to create such a risk "in the most extreme cases" where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.[388]

Once substantial grounds and real risk have been established in a case, the last aspect which has to be met is that ill-treatment must 'attain a minimum level of severity' if it is to fall within the scope of Article 3. According to the Court 'the assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its

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385 ECtHR 6 August 2008, *NA. v. the UK*, App. No. 25904/07.

386 Idem, para. 130.

387 ECtHR 1 June 2010, *Mawaka v. the Netherlands*, App. No. 29031/04 (NJCM 2010 includes annotation from H. Battjes).

388 ECtHR 28 November 2011, *Sufi and Elmi v. the UK*, App. Nos. 8319/07 and 11449/07, para. 218 (Ars Aequi RV20110003 includes annotation from K.A.E. Franssen and NJCM 2011 H. Battjes).

physical and mental effects and, in some cases, the sex, age and state of health of the victim.[389] There is no abstract, absolute standard for the kinds of treatment and punishment prohibited by Article 3 which makes it sometimes difficult to determine whether certain treatment is harsh or whether it amounted to inhuman or degrading treatment in the sense of Article 3. A certain act of ill-treatment may violate Article 3 in one case, while the same act may not violate this provision if the victim differs in sex, age and state of health. As Van Dijk et al. state, in this respect national authorities are often allowed a wide margin of appreciation.[390] When certain treatment does reach a minimum level of severity, the Court must differentiate whether the conduct qualifies as torture, inhuman and degrading treatment or punishment. It must be mentioned that for expulsion cases the existence of a real risk to be exposed to ill-treatment is more important than the gradation of the ill-treatment.

§ 4.2.3 Different forms of ill-treatment

In its report on the *Greek* case, the European Commission of Human Rights (EComHR) paid attention to the differences between the three forms of ill-treatment under Article 3 ECHR. According to the EComHR:

'It is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also degrading. The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable'. The word torture is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confession, or the infliction of punishment, and is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will of conscience'.[391]

With regard to the difference between torture and inhuman or degrading treatment, the ECtHR decided in *Ireland v. the UK* that the difference between these forms 'proceeds mainly from a difference of intensity in the suffering'. Torture which is considered to be the most severe form of ill-treatment is defined as 'deliberate inhuman treatment causing very serious and cruel suffering'. In its assessment whether the treatment suffered falls under torture, the Court often refers to Article 1 of the UN Convention against Torture which defines torture as the intentional infliction of severe

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389 ECtHR 18 January 1978, *Ireland v. the UK*, App. No. 5310/71, para. 162.
390 Van Dijk et al. 2006, pp. 412-413.
391 EComHR report of 5 November 1969, The *Greek* case, Yearbook 12 (1969).

pain and suffering.[392] The ill-treatment can thus be defined as torture when the ill-treatment contains the following three elements: a certain intensity of suffering that is to be distinguished from the other forms of ill-treatment; which is done on purpose with a specific goal, which will be often obtaining information or a confession.

For a punishment or treatment to be inhuman or degrading, 'the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment'.[393] The ECtHR has added that treatment can be considered to be degrading 'when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.[394] Like the difference between torture and other forms of ill-treatment, the distinction between inhuman and degrading treatment is one of gradation depending on the gravity of the inflicted harm. It should be noted that the ECtHR does not always make a clear distinction between the two forms and often makes use of both when qualifying the treatment.[395]

The Court considers the ECHR to be a living instrument, which means it must be given a dynamic interpretation and applied in the light of prevailing conditions. Changes in society and thinking may change the interpretation of the Convention's provisions and thus also of Article 3. Hence, certain acts which were in the past labeled as inhuman or degrading treatment, may at present or in the future be classified as torture.[396]

§ 4.2.4 Applicability on excluded asylum seekers

When the ill-treatment of a person is reasonably expected upon return to their country of origin, Article 3 ECHR prohibits expulsion and does not allow exceptions. The absolute character of Article 3 widens the international protection against *refoulement* in comparison to other refugee law and human rights instruments. This means that also asylum seekers who are excluded from a refugee or subsidiary protection status on the basis of Article 1F can claim protection against removal as by contrast to Article 33 (2) of the Refugee Convention, Article 3 does not deny protection in case of national security considerations. While Article 33 (1) of the Refugee Convention

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[392] See ECtHR 28 July 1999 (2000) 29 EHHR 403, *Selmouni v. France*, App. No. 25803/84, paras. 97-100.

[393] ECtHR 25 April 1978, *Tyrer v. the UK*, App. No. 5856/72.

[394] ECtHR 13 May 2008, *Juhnke v. Turkey*, App. No. 52515/99, para. 70 (RvdW 2008, 854).

[395] Van Dijk et al. 2006, p. 408; see also Hagens 2011.

[396] See for more on this, Letsas 2013.

is linked to a limited number of grounds of persecution (race, religion, nationality, membership of a particular social group or political opinion), the applicability of Article 3 solely depends on the character of the treatment, not on the source or the grounds of this treatment. Another difference between the two provisions is that Article 3 not only prohibits the risk of being subjected to certain acts after expulsion, but also the removal to a country where the situation apart from human activity is such by which the person can end up in inhuman circumstances. Contrary to Article 33 of the Refugee Convention, Article 3 does not deal with the right to political asylum but aims to protect people from ill-treatment.

In order to bring a case before the ECtHR under Article 34 of the ECHR and thus stop a removal, all domestic remedies must have been exhausted and an enforceable expulsion order must have been issued against the excluded asylum seeker. According to the Court, a violation of the Convention only occurs when there is an act of expulsion rather than a final decision to expel. The fact that a case is brought before the Court does not automatically mean that expulsion will be suspended while proceedings are pending. To stop a removal, the applicant or his representative can request the Court for an interim measure under Rule 39 of its Rules of Court with which the Court can indicate to the respondent government not to remove the person concerned to a particular country. Due to the short timeframes, the standard of proof applied in case of interim measures is not similar to individual applications under Article 34 of the ECHR. Nevertheless, when requesting such a measure, the applicant has to show, to the extent possible, that there are substantial grounds for believing that he is at real risk of irreparable harm when he is forcibly returned. In concrete, the applicant must submit all relevant documents regarding his case, which can include reports from NGOs and academic articles. After a request is submitted, the Court will decide as soon as possible on the case and inform the applicant and defending government by fax and post. The decision is taken in connection with proceedings before the Court without prejudging any subsequent decisions on the admissibility or merits of the case in question.

The length of an interim measure generally covers the duration of the proceedings before the Court or for a shorter period with the possibility for prolongation. Such a measure is binding and failure to respect it leads to a violation of Article 34 of the ECHR. In case of a refusal, the applicant can still continue with the main proceedings before the Court.[397] Most likely he has

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[397] UN High Commissioner for Refugees (UNHCR), *Toolkit on How to Request Interim Measures under Rule 39 of the Rules of the European Court of Human Rights for Persons in Need of International Protection*, February 2012, available at: <http://www.refworld.org/docid/4f8e8f982.html> (last accessed on 21 September 2015).

then already been expelled to his country of origin; continues to live illegally in the host country or moved to another country where he will try to start a new asylum procedure. It should be noted that the Court is not precluded from having regard to information which comes to light subsequent to the expulsion and can still give a judgment on whether a violation has taken place. In case the Court decides to issue an interim measure concerning the excluded asylum seeker, he will be allowed to remain in the host country during the proceedings. When the complaint is declared admissible on the basis of Article 35 ECHR, it is up to the Court to examine the case and when necessary to undertake an investigation.[398] Eventually, the application of Article 3 ECHR will take place in two steps: the Court has to decide whether the government's act can be qualified as an interference with the right to personal and physical integrity and assess whether this interference serves a legitimate aim and is proportionate to it. If the interferences are not justified, the act is to be described as ill-treatment.[399] Thus, the Court's task is to consider whether the removal would be compatible with the Convention and not to review whether an individual is in fact such a threat. The material point in time must be that of the Court's consideration and not when the decision to remove was made. Accordingly, the Court can revisit the decision months or even years later after it has been taken in the light of any changes in circumstances.

When the Court holds that Article 3 of the Convention has been violated or would be violated if the respondent government proceeds with the expulsion of the applicant, this decision is final and binding on respondent states. Based on Article 41 ECHR, the Court may afford just satisfaction to the injured party provided that the consequences of the violation cannot be fully repaired according to the internal law of the state concerned. After the judgment, the case is transmitted to the Committee of Ministers which is responsible for its execution. In cooperation with the state concerned, the Committee will consider which measures need to be taken to comply with the Court's judgment. These can be general measures to prevent further violations of a similar nature and individual measures including the payment of the compensation or legal costs as awarded by the Court; the revocation of a decision to expel and even facilitating the return of an individual who has been removed.[400]
The latter situation is of course difficult when the removed person is in hands of the authorities which do not want to return him or her. On the other hand, though the respondent state must abide by the measures that are imposed, the question is whether the removing state is willing to take back an alien

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398 Article 38 ECHR.
399 Battjes 2009, p. 618.
400 Mole & Meredith 2010, pp. 233-234.

who it suspects of war crimes and has already excluded from a status. Even when the authorities are cooperating, it can last for years after a judgment before a case can be actually closed.[401]

The fact that the Court prevents the removal of an excluded asylum seeker does not automatically mean the person will be issued a residence permit. As mentioned previously, Article 3 provides protection, but it does not imply a right to stay in the host state. The Court has not ruled on what legal status should accrue to persons who cannot be removed, although it has stated that protection from *refoulement* under the Convention does not guarantee as such a right to a residence permit. It will thus depend on the regulation of the state concerned whether a person will be provided a status or his stay will only be tolerated without the issuance of a residence title. Tolerating an alien's stay can be approached in different ways: it may mean that during his stay the person is entitled to certain rights and housing, but it may also imply solely a suspension of expulsion without any entitlement to social support. If the latter situation lasts for several years, it raises the question of whether exposing a person to the severe consequences of such a situation could lead to a breach of Article 3? The ECtHR has already tackled this issue in relation to 1F cases brought to Court.[402] Also relevant to mention within the scope of this question is the *M.S.S. v. Belgium and Greece*[403] case in which the Court found a violation of Article 3 regarding the applicant's detention conditions in Greece. Additionally, the *M.S.S.* case is the first judgment in which the Court also found the living conditions of the applicant to be contrary to Article 3.[404]

The case concerned an asylum seeker who was transferred from Belgium to Greece according to the Dublin Regulation. In its assessment, the Court points out to the Greek authorities' obligations under the European Reception Conditions Directive and expresses that: 'the obligation to provide accommodation and decent material conditions to impoverished asylum seekers has now entered into positive law and the Greek authorities are bound to comply with their own legislation, which transposes Community Law, namely the Reception Conditions Directive'.[405] The Court states that it has not excluded the possibility that the responsibility of the state under Article 3 might be engaged in respect of treatment where an applicant, who was wholly dependent on state support, found himself faced with official indifference in a situation of serious deprivation or want incompatible with

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401 See Rainey, Wicks & Ovey 2014, pp. 502-506 regarding the possibilities available for the Committee when States do not comply with their obligations.

402 See § 4.6-4.7.

403 ECtHR 21 January 2011, *M.S.S. v. Belgium and Greece*, App. No. 30696/09 (JV 2011/68 includes annotation from H. Battjes).

404 See Mallia 2011 and Battjes 2011.

405 ECtHR *M.S.S. v. Belgium and Greece*, para. 250.

human dignity.[406] According to the Court, the Greek authorities have not had due regard to the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considered that the applicant had been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation had, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It finds that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention. The Court also found Belgium to be in breach of Article 3 because, *inter alia*, it had transferred the applicant to Greece and thus knowingly exposed him to living conditions which amounted to degrading treatment.[407]

The approach taken by the Court in the *M.S.S.* case was relevant for the Court's following judgments on Article 3 ECHR regarding the living conditions of asylum seekers.[408]

One of these cases which also concerned Greece is *Rahimi*.[409] The applicant who was an unaccompanied minor from Afghanistan, was held in the Pagani detention centre on the island of Lesbos and subsequently released with a view to his expulsion. In view of the failure to take into account the applicant's

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406 Idem, para. 253.

407 The ECJ 21 December 2011, *N.S. v. Secretary of State for the Home Department* and *M.E., A.S.M., M.T., K.P. and E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform,* App. Nos. C-411/10 and C-493/10 (NJCM 2011 includes annotation from A.M. Reneman) joined cases also concerned transfers to Greece in which the European Court of Justice made a reference to the *M.S.S.* case. The question before the ECJ was essentially whether, and if so under which circumstances, a Member State is required under EU law to assume responsibility for examining asylum applications itself, even though another Member State is primarily responsible for the examinations under the Dublin II Regulation? The Court stated that if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the receiving Member State resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, the transfer would be incompatible with that provision (para. 86). Accordingly, the transfer to the Member State responsible is not allowed when the transferring Member State 'cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter' (paras. 94 and 106).

408 See Bossuyt 2012.

409 ECtHR 5 April 2011, *Rahimi v. Greece*, App. No. 8687/08 (JV 2012/106).

extremely vulnerable individual situation and the detention conditions in the Pagani centre, which were so serious as to be an affront to human dignity, the Court held that the applicant had been subjected to degrading treatment, despite the fact that his detention had lasted for only two days. The Court also found the authorities' failure to take care of him as an unaccompanied minor following his release amounted to degrading treatment in breach of Article 3. With regard to the latter, the Court referred to *M.S.S.* in which it had noted "the particular state of insecurity and vulnerability in which asylum seekers are known to live in Greece" and had found that the Greek authorities were to be held responsible "because of their inaction".

The *Tarakhel v. Switzerland* case[410] concerned an Afghan family with minor children who were to be transferred from Switzerland to Italy according to the Dublin Regulation. Applicants argued that if they were returned by the Swiss authorities to Italy 'in the absence of individual guarantees concerning their care 'they would be subjected to inhuman and degrading treatment linked to the existence of 'systematic deficiencies' in the reception arrangements for asylum seekers. The Court considers it necessary to follow a similar approach to what is adopted in the *M.S.S.* judgment, in which it examined the applicant's individual situation in the light of the overall situation prevailing in Greece at the relevant time, but states that the situation in this case is different than *M.S.S.* The Court notes that the overall situation of asylum seekers in Italy can in no way be compared to that of Greece at the time of the *M.S.S.* judgment[411] and the specific situation of the applicants in the present case is also different from that of the applicant in *M.S.S.*, whereas the applicants in this case were immediately taken charge of by the Italian authorities, while the applicant in *M.S.S.* was first placed in detention and then left to fend for himself, without any means of subsistence.[412] Though the situation of the reception system is not comparable to the situation in Greece in *M.S.S.*, the Court expresses that 'the possibility that a significant number of asylum seekers removed to that country may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions is not unfounded. It is therefore incumbent on the Swiss authorities to obtain assurances from their Italian counterparts that on their arrival in Italy the applicants will be received in facilities and in conditions adapted to the age of the children, and that the family will be kept together'. Accordingly, 'were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would

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410 ECtHR 4 November 2014, *Tarakhel v. Switzerland*, App. No. 29217/12 (EHRC 2015/33 includes annotation from J.R. Groen).

411 Idem, paras. 114-115.

412 Idem, para. 117.

be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of Article 3 ECHR'.

Also worthwhile to mention is the *Sufi and Elmi v. the UK* case.[413] The two applicants were Somali nationals who were detained in the UK and facing removal to Somalia. They complained that their removal to Somalia would place their lives at risk and/or expose them to a real risk of ill-treatment. The Court held that the violence in Mogadishu is of such a level of intensity that anyone in the city, except possibly those who are exceptionally well-connected to "powerful actors", would be at real risk of treatment prohibited by Article 3 of the Convention.[414] With regard to internal relocation, the Court accepted that it might be possible for a returnee to travel from Mogadishu International Airport to another part of southern and central Somalia without being exposed to a real risk of treatment proscribed by Article 3. However, a returnee with no recent experience of living in Somalia would be at real risk of ill-treatment if his home area was in - or if he was required to travel through - an area controlled by al-Shabaab, as he would not be familiar with the strict Islamic codes imposed there and could therefore be subjected to punishments such as beating, flogging, stoning or amputation. If a returnee had no family connections, or could not travel safely to an area where he had such connections, the Court considered it reasonably likely that a returnee would find himself in an IDP camp, such as those in the Afgooye Corridor, or in a refugee camp, such as the Dadaab camps in Kenya, where there would be a real risk that he would be exposed to treatment in breach of Article 3 on account of the humanitarian conditions there.[415]

Later on in this chapter I will reflect on to the question raised above, which is whether leaving a person in limbo for many years, without any entitlement to facilities, could lead to a breach of Article 3. Further, I will discuss in more detail the situation of those aliens who are protected against expulsion but who are not issued a residence permit. For now, there are two more matters related to Article 3 ECHR and the expulsion of aliens, including excluded asylum seekers, which should be mentioned under paragraph 3. These are the use of diplomatic assurances and the status of detention conditions.

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413 ECtHR 28 June 2011, *Sufi and Elmi v. the UK*, App. Nos. 8319/07 and 11449/0711449/07 (Ars Aequi RV20110003 includes annotation from K.A.E. Franssen and NJCM 2011 H. Battjes).

414 Idem, para. 250.

415 Idem, para. 296.

§ 4.2.5 Relevant issues relating to Article 3 and expulsion

Diplomatic assurances can be described as a guarantee, given by the receiving state to which removal will take place, to the sending state which affirms treatment in accordance with the sending state's human rights obligations under international law. Such assurances are legally non-binding, political bilateral agreements which are most often requested in extradition cases.[416] Besides extradition, these agreements are also used in expulsion cases of aliens who are refused asylum, including those whom the sending state suspects of terrorist activities and/or considers a danger to national security.[417] Contrary to the many extradition cases in which the ECtHR often accepted diplomatic assurances as a precaution against the risk of ill-treatment,[418] there are only a few expulsion cases settled by the Court of which in one recent judgment, assurances are accepted.

In the *Chahal* case, India had provided assurances to the UK stating that applicant would enjoy the same legal protection as any other Indian citizen and that he would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities. The Court did not doubt the good faith of the Indian government, but was not convinced the assurances would guarantee an actual safety to Mr Chahal: 'despite the efforts of the government, the National Human Rights Commission and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem'. The Court further attached significance to the 'endemic nature of torture in police custody, the inadequate measures taken to bring those responsible to justice, problems of widespread, often fatal, mistreatment of prisoners and lack of systematic reform of the police'.[419]

The *Saadi* case concerned a removal to Tunisia in which the Italian embassy in Tunis requested the Tunisian government to assure the applicant would not be subjected to treatment contrary to Article 3. Though Tunisia did not provide such assurances, the Minister for Foreign Affairs answered the request by stating that the Tunisian laws in force guarantee and protect the rights of prisoners in Tunisia and secure to them the right to a fair trial. He also pointed out that Tunisia voluntarily acceded to the relevant international treaties and conventions. According to the ECtHR 'the existence of

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416 UNHCR Note on Diplomatic Assurances and International Refugee Protection, Protection Operations and Legal Advice Section Division of International Protection Services, Geneva, August 2006, pp. 2-3.

417 Cox 2010; Jillions 2015.

418 See e.g. ECtHR 17 January 2012, *Harkins and Edwards v. the UK*, App. Nos. 9146/07 and 32650/07 (RvdW 2012/1517).

419 Paras. 104-105 of the judgment.

domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.[420] Even when the authorities would have given assurances as requested by Italy, this would not have absolved the Court from the obligation to examine whether these assurances, in their practical application, are a sufficient guarantee against ill-treatment. The weight to be given to assurances depends in each case on the circumstances prevailing at the material time'.[421]

The latter principle is confirmed in *Othman v. UK* and led to another outcome than that of *Saadi* as the Court did accept the assurances which the Jordanian government gave to the UK.[422] Like the *Chahal* and *Saadi* cases, this case also concerned the expulsion of a terrorist suspect. In its judgment, the Court lists several factors which it already mentioned in earlier case law that among others must be considered in order to decide whether the assurances can be relied upon. Some of these are, whether the terms of the assurances have been disclosed to the Court; who has given the assurances and whether that person can bind the receiving state; whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers etc. According to the Court, 'the UK and Jordanian governments have made genuine efforts to obtain and provide transparent and detailed assurances to ensure the applicant will not be ill-treated upon

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420 See also ECtHR 23 February 2012, *Hirsi Jamaa and Others v. Italy,* App. No. 27765/09 (JV 2012/171 includes annotation from M.Y.A. Zieck) which concerned the return to Libya of a group of Somalis and Eritrean nationals, who were intercepted by the Italian revenue police on the high seas. While various international organisations raised concerns and condemned the situation of irregular migrants in Libya, the Italian government argued that Libya was safe for return. They referred, *inter alia*, to the Italian-Libyan Friendship Treaty of 2008 in which Libya declares to comply with its obligations under international human rights law. As in *Saadi*, the Court repeated that the 'existence of domestic laws and ratification of international treaties on fundamental rights is not sufficient to guarantee safety, while reliable sources report practices which are not in keeping with the Convention'. Furthermore, the Court expressed that Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya. When the applicants were removed, the Italian authorities knew or should have known that being irregular migrants, they would be exposed to treatment contrary to the Convention and would not be provided with protection.

421 Paras 147-148 of the judgment. See also Gentili 2010.

422 ECtHR 17 January 2012, *Othman (Abu Qatada) v. the UK*, App. No. 8139/09 (JV 2012/143 includes annotation from H. Battjes).

return. It finds the Memory of Understanding to be superior in both its detail and its formality to any assurances previously examined by the Court and concludes that upon return the applicant will not be exposed to a real risk of ill-treatment.[423] Though the ECtHR ruled that the expulsion of the applicant would not violate Article 3 ECHR, it did conclude that removal to Jordan to be retried would give rise to a flagrant denial of justice in violation of Article 6 of the Convention.

The fact that the Court often accepts assurances given in the context of extradition has to do with the fact that in such cases it is often clear what can be expected; it is clear what criminal charges are made and what penal sentence is sought. It is thus easier to determine the value and effectiveness of the assurances given. In expulsion cases it is more difficult to assess the value of the assurances given.[424] The Court's case law shows that in these cases and especially when there are reports showing widespread practices of ill-treatment in a certain country, it must be established that the assurances are not guaranteed in words but also in its factual application.

Besides diplomatic assurances, also the conditions in aliens' detention premises is a relevant topic with regard to Article 3. Aliens who have been issued an expulsion order are often placed in administrative detention before the actual removal takes place. Reasons for this can be that the person is suspected of intending to abscond, considered to be a threat to public order or hinders the preparation of his or her departure or the expulsion procedure. The state of detention conditions, possibly in combination with the length of period the applicants were exposed to bad living conditions can lead to a breach of Article 3 ECHR as was the case in the above discussed *M.S.S* and *Rahimi* judgments. As already mentioned earlier under the terms of Article 3, for such a breach, it is necessary for a minimum level of severity to have been reached. Such an assessment is relative and in each case the facts must be viewed in the light of the circumstances as a whole.

According to the Court, 'the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance detention conditions must be compatible with respect for human dignity and a

423 Grozdanova 2015; Giuffré 2013.
424 Wouters 2009, p. 304.

detained person's health and well-being must be adequately secured'.[425] This principle also counts for aliens who are awaiting expulsion or are detained by the immigration authorities.[426]

The Court judged in the *Dougoz v. Greece* case[427] that when assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as the applicant's specific allegations. In *Aden Ahmed v. Malta*, the applicant was kept in administrative detention for 14.5 months where she, among others, claimed to have suffered from cold and heat as during the summer the dormitories in which detainees has been kept became oppressively hot and other times very cold and no proper blankets were supplied; there was a lack of female staff and the only access she had to open air, the exercise yard was closed for three months. The Court noted that taken as a whole and in the light of the applicant's specific situation, the cumulative effect of the conditions had diminished her human dignity and had to have made her feel anguish and inferiority capable of humiliating and debasing her and possibly breaking her physical and moral resistance, thus constituting degrading treatment within the meaning of Article 3 ECHR.[428] The *Popov. v. France* case[429] concerned spouses who were Kazakh nationals and applied for asylum in France. Together with their children they were placed in administrative detention from 28 August till 12 September 2007. The Court found a violation of Article 3 ECHR in respect of the administrative detention of the children and noted that whilst the authorities had been careful to separate families from other detainees, the facilities available in the 'families' area of the centre were nevertheless ill-adapted to the presence of children: no children's beds and adult beds with pointed metal corners, no activities for children, a very basic play area on a small piece of carpet, a concreted courtyard of 20 sq.m. with a view of the sky through wire netting, a tight grill over the bedroom windows obscuring the view outside, and automatically closing bedroom doors with consequent danger for children.[430] Accordingly, in view of the children's young age, the length of their detention and the conditions of their confinement in a detention centre, the Court is of the view that the authorities failed to take into account the inevitably harmful consequences for the children. It finds the threshold of seriousness for Article 3 of the Convention to be exceeded.

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425 ECtHR 26 October 2000, *Kudla v. Poland*, App. No. 30210/96, para. 94 (USZ 2001/37).

426 See ECtHR 22 July 2010, *A.A. v. Greece*, App. No. 12186/08 (JV 2010/336).

427 ECtHR 6 March 2011, *Dougoz v. Greece*, App. No. 40907/98.

428 ECtHR 9 December 2013, *Aden Ahmed v. Malta*, App. No. 55352/12.

429 ECtHR 19 January 2012, *Popov v. France*, App. Nos. 39472/07 and 39474/07 (JV 2012/167 includes annotation from H. Battjes).

430 Idem, para. 95.

An important source for the Court concerning detention conditions are the country and general reports of the CPT[431] as also turned out in the *Yarashonen v. Turkey* case.[432] The applicant, who is a Russian national of Chechen origin, complained among others about the detention conditions at the Kumkapi Removal Centre where he was detained for almost six months. One of the points of the applicant concerned the severe overcrowding in the centre. The Court noted that in view of the limited nature of the information provided by the government, it was not possible to establish with any certainty the personal space available to the applicant in the room. This led to the situation that the Court made an approximate assessment of the floor space per detainee and paid attention to earlier observations of the CPT regarding the problem of overcrowding at the Kumkapi Removal Centre.

Besides Article 3 ECHR which can be at stake regarding detention conditions, another relevant provision with respect to the legality of detention itself is Article 5 ECHR. This article guarantees the right to physical liberty, except when detention is based on one of the 6 stated grounds. One of these grounds, sub (1) (f) concerns aliens' detention which is also relevant with regard to excluded asylum seekers under Article 1F and will be discussed in the next paragraph.

§ 4.3 Article 5 (1) (f) in connection with Article 1F

Article 5 provides that 'No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: 1 (f) 'the lawful arrest or detention of a person to prevent his affecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. Aliens' detention is a familiar phenomenon within Europe which is imposed on immigrants who do not have valid residence documents for their stay in the country. Detaining those who enter the country without documents is mainly done to verify their identity. This group also includes those who apply for asylum. When it turns out during the proceedings that the official who questioned the asylum seeker has suspicions of a possible 1F situation, it is very imaginable that the person is kept in detention awaiting the investigation due to national security reasons. A different matter is when a decision is taken on the alien's asylum application and he is excluded on the basis of Article 1F. In this case, the person would most likely not have the right to stay in the country, setting aside a possible *non-refoulement* or other issue, and is to be expelled. In such a situation, the risk of absconding and being a threat to public order are reasons for countries to impose pre-removal detention on these persons. Though in both situations states are able to detain the alien, in order to be in

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[431] See Hagens 2011.

[432] ECtHR 24 September 2014, *Yarashonen v. Turkey*, App. No. 72710/11.

line with Article 5 ECHR, the detention should not be arbitrary.[433] As long as the detention is not arbitrary, the Court sees no need to determine whether it is necessary and proportionate.[434] It is relevant to mention concerning the position of an excluded asylum seeker that the ECtHR ruled that when an interim measure is issued to stop the removal of the alien, it does not accept authorities' to claim detaining a person with a view to removal.[435] This means that the alien must be granted leave to stay in the country for the period the interim measure applies.

The practices among EU countries concerning the length of pre-removal detention varied as certain countries did not have a maximum time limit as others changed from a few months up to two- years.[436] The entry into force of the Returns Directive which is presently implemented by the EU Member States sets the upper time limit at 18 months. In contrast with Article 5 (1) (f) ECHR, the Returns Directive does require detention to be necessary. This also counts for the EU Reception Conditions Directive and several instruments from other organisations such as the UNHCR, the CPT, the Committee of Ministers and the UN Working Group on Arbitrary Detention.[437]

A person who is detained on one of the grounds of Article 5 (1) ECHR is entitled to the procedural rights as prescribed in paragraphs 2 to 5 of Article 5.[438] Pursuant to Article 5 (2) ECHR, 'everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him'. The Court ruled that it should be interpreted as meaning that anyone arrested, must be told in simple, non-technical language that he can understand the essential legal and factual grounds for his arrest, so that he can, if necessary, apply to a

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433 The Court judged in *Saadi v. UK* that the detention measure must comply with certain criteria in order not to be considered arbitrary. This means that, 'detention must be carried out in good faith; be closely connected to the purpose of preventing unauthorised entry; the place and conditions of detention should be appropriate and the length should not exceed that reasonably required for the purpose pursued'. In addition to the latter criteria the proceedings must be pursued with due diligence.

434 Mole & Meredith 2010, 149-150.

435 ECtHR 26 April 2007, *Gebremedhin v. France*, App. No. 25389/05 (Ars Aequi RV20070069 includes annotation from H. Battjes).

436 See 'Detention of third country nationals in return procedures', EU Agency for Fundamental Rights, <http://www.refworld.org/pdfid/4ecf77402.pdf> (last accessed on 21 September 2015).

437 Mole & Meredith 2010, pp. 158-162.

438 Several safeguards as laid down in the ECHR provisions are also included in the non-binding 'Twenty Guidelines on Forced Return' of the Council of Europe's Committee of Ministers.

court to challenge its lawfulness.[439] This guarantee is especially relevant for aliens who are detained pending their expulsion and do not understand the language. In such a case, they should be assisted by an interpreter. According to the Court, the information offered in expulsion proceedings may be less comprehensive than in cases of an arrest on the basis of a specific criminal offence.

Paragraph 4 lays down that 'everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if his detention is not lawful'. As this provision applies to everyone, irrespective of the reason for detention, it provides relevant safeguards for those to whom aliens' detention is imposed. When the detention is ordered by an administrative body, it is especially important that a judicial review takes place. Paragraph 4 not only demands the initial detention to be reviewed on its lawfulness but also requires a regular periodic review by a court. The court to which the detainee has access does not have to be a 'court of law of the classic kind integrated within the standards judicial machinery of the country' but must be a body of a 'judicial character' offering certain procedural guarantees. The court must be independent both of the executive and of the parties of the case and have the power to order release if it finds the detention to be unlawful.[440] The term 'lawfulness' has the same meaning as under Article 5 (1) and in case of detention awaiting expulsion, judicial control of legality is required only in relation to the decision concerning the detention prior to the expulsion. With regard to 'speedily' it refers to both access to judicial review and the decision of the review court. Whether the review happened speedily depends on the circumstances in each case, but it must be ensured that it is carried out in the shortest possible time.[441] Though the issue of legal assistance is not explicitly mentioned in paragraph 4, the Court's case law shows that the right to legal assistance is a fundamental guarantee for a detainee who would be unable to exercise his right really and effectively.

With regard to the detention of aliens, also the Returns Directive and the recast Directive on Asylum Procedures offer guarantees in accordance with Article 5 (4) ECHR, such as the right to a speedy judicial review of the lawfulness of detention.[442]

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439 Idem, p. 168.

440 Jacobs & White 2014, p. 153.

441 See ECtHR Guide on Article 5 of the Convention, Right to Liberty and Security, Council of Europe June 2014 pp. 30-34.

442 See Article 15 (2) of the Returns Directive and Article 26 of the recast Directives on Asylum Procedures.

Article 5 ECHR is closely connected to Articles 6 (right to a fair trial) and 13 (right to an effective remedy) of the Convention.[443] The procedural guarantees offered under Articles 5 (4), 6 and 13 ECHR may overlap and the Court has held the first two mentioned provisions to be *leges speciales* in relation to the more general requirements of Article 13. When Articles 5 and 6 are violated, the Court does not find it necessary to hold a separate examination under Article 13.[444] Considering the provisions on safeguards from the perspective of immigration matters, Article 13 can be considered to be the most relevant Convention provision for the alien as the Court's standing interpretation with regard to Article 6 is that it does not apply to expulsion cases[445] and Article 5 applies only in case of detention with a view to prevent a unlawful entry or when expulsion/extradition proceedings are pending.[446] In the next paragraph Article 13 ECHR will be discussed.

§ 4.4 Right to an effective remedy

Article 13 ECHR guarantees an effective remedy before a national authority to everyone who claims that his rights and freedoms under the Convention have been violated.[447] Thus, the provision secures a remedy at national level to cases in which the alleged violation concerns one of the rights and freedoms of the Convention and can only be invoked in conjunction with these. In practice this means that aliens can only refer to Article 13 when a decision regarding entry, settlement or removal and the consequent threatened expulsion allegedly violates a Convention right, such as in Article 3 or 8.

In order to complain of a violation of Article 13, the applicant must have an arguable claim. The Court held that 'where an individual has an arguable claim to be the victim of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress. In all the cases where a complaint is found to be admissible under Article 35 (3) ECHR, it is also considered to be arguable, thus the Court applies the same threshold for both.[448]

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443 See Boeles 1997, pp. 217-221 for a discussion of these three provisions.

444 As stated by Cuenca 2012, p. 466; in recent years the Court has increasingly used Article 13 as a right/safeguard for the other rights.

445 ECtHR 5 October 2000, *Maaouia v. France*, App. No. 39652/98; ECtHR 4 February 2005, *Mamatkulov and Askarov v. Turkey*, App. Nos. 46827/99 and 46951/99 (JV 2005/89 includes annotations from B.P. Vermeulen and K. de Vries).

446 Also Article 1 of Protocol No. 7 should be mentioned, as according to this provision a legal remedy must be available in case of expulsion of an alien who is lawfully present in the territory of a Contracting State. The fact that Article 1 only concerns aliens who are lawfully resident in a country, limits the scope of the provision.

447 ECtHR 6 September 1978, *Klass and others v. Germany*, App. No. 5029/71.

448 Lambert 2006, p. 36.

Article 13 requires the remedy to be effective. In the *Conka* case, the Court stated that: 'the scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be 'effective' in practice as well as in law. The 'effectiveness' of a 'remedy' within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the 'authority' referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and guarantees which it affords are relevant in determining whether the remedy before it is effective.[449] Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so'.[450]

The relevance of Article 13 for an excluded asylum seeker who is facing expulsion will often be in the context of Article 3. When no effective and accessible remedy is provided for the applicant's complaint under Article 3, this situation can lead to a violation of Article 13. The Court ruled that the notion of an effective remedy under Article 13 requires 'independent and rigorous scrutiny of a claim that there exist substantial grounds for believing that there was a real risk of treatment contrary to Article 3 in the event of the applicant's expulsion to the country of destination and a remedy with automatic suspensive effect'.[451] According to the Court, this scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State.

The Court's case law shows that the conduct of the person is not a relevant factor for the assessment of a violation of Article 3 ECHR. As stated before, this provision has an absolute character. Also an excluded asylum seeker facing expulsion and invoking Article 3 (or any other provision of the Convention), must be provided with the possibility to have his case scrutinised by national authorities. The fact that the appeal must have a suspensive effect, thus suspend any expulsion order which may be in force and should not be constrained by a restrictive time limit within which the application must be lodged are important guarantees for the alien.[452]

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449 The key element for the Court is the capacity of the authority to provide an effective remedy in practice and in law. It may in this regard have to conduct a thorough and effective investigation.

450 ECtHR 5 February 2002, *Conka v. Belgium*, App. No. 51564/99, para. 75 (JV 2002/117 includes annotation from B.P. Vermeulen).

451 ECtHR 22 September 2009, *Abdolkhani and Karimnia v. Turkey*, App. No. 30471/08 (Ars Aequi RV20090003 includes annotation from T.P. Spijkerboer).

452 ECtHR 2 December 2008, *K.R.S. v. the UK*, App. No. 32733/08 (JV 2009/41 includes annotation from HBA).

With respect to the right to an effective remedy and fair trial, the EU Charter must be mentioned as Article 47 includes the guarantees as accepted by the ECtHR in Articles 6 and 13 and goes further regarding protection. The latter means, among others, that the right to a fair trial applies to all claims under EU law and not only to those concerning civil rights and obligations or criminal charges, as is the case under Article 6 ECHR.[453] Thus, under EU law immigration issues also fall under the right to a fair trial.[454] The explanatory notes of the Charter state that nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union and that the implementation of the right to effective remedies should be in accordance with the criteria as developed by the ECtHR on the basis of Article 13.[455] Article 47 of the Charter is, *inter alia*, reflected in the recast Directive on Asylum Procedures (Article 46) which provides the right to an effective remedy before a court or tribunal against a decision taken on the application for asylum and allows applicants to remain in the country pending the outcome of the remedy. Furthermore, the right to free legal assistance and representation is included.[456] Also Article 13 of the Returns Directive provides aliens an effective remedy 'to appeal against or seek review of decisions related to return, including return decisions, entry ban decisions and removal decisions, before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence'. Paragraphs 2 and 3 of the provision relate to the suspension of the decision on return and the possibility of legal advice, representation and where necessary linguistic assistance. The above-mentioned provisions in these Directives are not exhaustive; however, looking at the issue of the right to an effective remedy from the viewpoint of an excluded asylum seeker, these are the most relevant ones to mention. When the alien receives a rejection on his application and consequently a removal decision, it is important that he has these decisions reviewed and for him not to be removed pending these proceedings.

Within this perspective, the *Moussa Abdida* case[457] of the ECJ should be mentioned. The applicant applied to the Belgian authorities to remain in Belgium on medical grounds, stating he needed medical treatment there for a serious illness. His request to remain in Belgium was turned down and his social assistance was then withdrawn. He appealed against those decisions.

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453 Furthermore, the extensive protection of Article 47 of the Charter is apparent from the fact it does not request an arguable claim; an effective remedy is required when a right guaranteed by Community law is affected; the remedy must be brought before a court and legal aid must be available.

454 See Wallage 2015.

455 Explanations relating to the Charter of Fundamental Rights, 14 December 2007, C303/17.

456 See Articles 20-23 of the recast Directive on Asylum Procedures.

457 ECJ 18 December 2014, *Moussa Abdida*, App. No. C-562/13.

The Belgian court to which he appealed found that, under Belgian law, applicant had no judicial remedy providing for suspension of the decision refusing him permission to remain in Belgium and he was not entitled to any form of social assistance other than emergency medical assistance. The Belgian court thus asked the ECJ whether as a matter of EU law he should have available a remedy with suspensive effect and whether he should receive basic social assistance other than the emergency medical care pending his appeal.

According to the Court, Articles 5 (*non-refoulement* principle) and 13 of the Returns Directive, taken in conjunction with Articles 19 (2) (*non-refoulement* principle) and 47 of the Charter, must be interpreted as precluding national legislation which does not make provision for a remedy with suspensive effect in respect of a return decision whose enforcement may expose the third country national concerned to a serious risk of grave and irreversible deterioration in his state of health and are Member States required to provide for the basic needs of such an alien suffering from a serious illness in order to ensure that that person may in fact avail himself of emergency health care and essential treatment of illness during the period in which that Member State is required to postpone removal of the third country national following the lodging of the appeal.[458]
The last Convention provision to be discussed within the context of expulsion is Article 8 which establishes the right to respect for private and family life, home and correspondence.[459] As most of the Court's case law concerning aliens and Article 8 relates to the right to family life, I will restrict my comments to this aspect.

§ 4.5 The importance of 'family life' for excluded asylum seekers

The first case in which the ECtHR dealt with migration issues in relation to Article 8 was *Abdulaziz, Cabales and Balkandali v. UK*.[460] The Court held that states have a sovereign right to control immigration and that Article 8 does not confer on immigrants a right to choose their place of residence. Article 8 ECHR can only limit state action when family life is not possible elsewhere, due to legal or factual obstacles.[461]

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458 Idem paras. 62-63.
459 See Van Dijk et al. 2006 Chapter 12 for a comprehensive discussion on all the aspects related to Article 8 ECHR.
460 ECtHR 28 May 1985, *Abdulaziz, Cabales and Balkandali v. UK*, App. Nos. 9214/80, 9473/81 and 9474/8.
461 Roca & Santolaya 2012, p. 347.

An appeal to Article 8 ECHR in relation to admission can concern various situations.[462] The most obvious one, which is referred to as negative obligation cases, relate to expulsion. In such a case, an alien who has close family ties or an established family unit in the host country is facing removal and thus risks to be separated from the other family members. With regard to asylum seekers, family life can be constituted in two ways. It is possible that during the asylum application proceedings, which can last for quite a long period, the person has entered into personal and family relationships. On the other hand, the situation may occur in which one of the family members has gained international protection and others who did not, want to remain with or join the protected individual on the basis of their relationship to that person.[463] Both of these situations can apply in case of an excluded asylum seeker to whom Article 1F is enforced.
Also falling within the scope of Article 8, is the right to family reunification.[464] Thus, in the case where a request for family reunion with family members living abroad is rejected, Article 8 may be invoked. A last category of cases in which Article 8 is frequently relied on, refers to aliens who are residing illegally in the host country. In such cases, the person claims his stay to be regularised in order that he/she can remain with his/her family members. This category is of importance regarding excluded asylum seekers who cannot be removed from the host country, but are not granted a legal stay either. The last two mentioned situations are defined as positive obligation cases in which states have to actively protect family life and private life of aliens. According to the Court 'the boundaries between the state's positive and negative obligations do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the state enjoys a certain margin of appreciation'.[465]

The Court expressed that Article 8 protects the nuclear family structure, thus spouses, parents and children, but also other forms of family ties may

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462 Thym 2008, p. 96.

463 It also occurs that an alien who is issued a legal stay in the first instance risks removal after withdrawal and appeals to Article 8 in order to maintain his family life in the host country.

464 Article 23 of the Qualification Directive requires Member States to ensure that family unity can be maintained. However, in paragraph 3 is stated that this is not the case when the family member is excluded from asylum.

465 ECtHR 19 February 1996, *Gül v. Switzerland*, App. No. 23218/94, para. 38. Similarly in more judgments such as 30 July 2013, *Berisha v. Switzerland*, App. No. 948/12 (EHRC 2013/223 includes annotation from A.J.T. Woltjer) and 3 November 2011, *Arvelo Aponte v. the Netherlands*, App. No. 28770/05 (RV 2012, 23 includes annotation from Helmink).

fall under Article 8, such as relations with grandparents. It is not necessary to have blood ties. In its *Al-Nashif* judgment, the Court expressed that:

'the existence or non-existence of 'family life' is essentially a question of fact depending upon the reality in practice of close personal ties. Nevertheless, it follows from the concept of family on which Article 8 is based that a child born of a marital union is *ipso jure* part of that relationship; hence from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to 'family life' which subsequent events cannot break save in exceptional circumstances. In so far as relations in a couple are concerned, 'family life' encompasses both families based on marriage and also *de facto* relationships. When deciding whether a relationship can be said to amount to 'family life, a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means'.[466]

Besides 'family life', the Court has treated the expulsion of long-term residents also under the head of 'private life' in which importance is attached to the degree of social integration of the persons concerned. Thus, the private life of a person only comes within the reach of Article 8 after the lapse of a certain time period and gains weight the longer a person has lived in a country and developed 'the network of personal, social and economic relations that make up the private life of every human being'.[467]

As stated above, states enjoy a certain margin of appreciation when assessing whether an interference with a right protected by Article 8 was necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The Court's task consists of ascertaining whether the impugned measures struck a fair balance between the relevant interests, namely the individual's rights protected by the Convention on the one hand and the community's interests on the other.

In case of expulsion of long-term residents, the Court requires the state to show that the interfering measure is necessary in a democratic society; responds to a pressing social need, and in particular is proportionate to

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466 ECtHR 20 September 2002, *Al-Nashif and others v. UK*, App. No. 50963/99, para. 112 (JV 2002/239 includes annotation from E. Guild).

467 ECtHR 9 October 2003, *Slivenko v. Latvia*, App. No. 48321/99 (JV 2003/494 includes annotation from B.P. Vermeulen).

the legitimate aim pursued.[468] In the *Amrollahi and Keles* cases, the Court repeated criteria which have to be taken into consideration when assessing whether expulsion of such persons is proportionate in cases where criminal offences have been committed: 'In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he is going to be expelled; the time elapsed since the offence was committed and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; and other factors expressing the effectiveness of a couple's family life; whether the spouse knew about the offence at the time when he entered into a family relationship; and whether there are children in the marriage, and if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse is likely to encounter in the country of origin, though the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself exclude an expulsion'.[469]

In the *Üner* case,[470] the Court added two more criteria in addition to the ones stated above. These are the best interests and well-being of the children,[471] in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled and the solidity of social, cultural and family ties with the host country and the country of destination. The Court ruled that although all listed circumstances must be taken into consideration, the seriousness of the committed crime must be accorded predominant weight. Where expulsion measures against a juvenile offender are concerned, the obligation to take the best interests of the child into account includes an obligation to facilitate his or her reintegration.[472]

In general it can be summarised that the Court's case law on long-term immigrants shows that the period a person has lived in the host country

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468 ECtHR 18 February 1991, *Mostaquim v. Belgium*, App. No. 12313/86 and 9 October 2003, *Slivenko v. Latvia*, App. No. 48321/99 (JV 2003/494 includes annotation from B.P. Vermeulen).

469 ECtHR 11 July 2002, *Amrollahi v. Denmark*, App. No. 56811/00 (Ars Aequi RV20020051 includes annotation from T.P. Spijkerboer) and 27 October 2005 *Keles v. Germany*, App. No. 32231/02 (JV 2005/450). The criteria were initially accepted in 2 August 2001, *Boultif v. Switzerland*, App. No. 54273/00 (JV 2001/254 includes annotation from PB)

470 ECtHR 18 October 2006, *Üner v. the Netherlands*, App. No. 46410/99 (JV 2004/369).

471 See Smyth 2015 for more on the use of the 'best interest of the child' principle in the ECtHR's case law.

472 ECtHR 23 June 2008, *Maslov v. Austria*, App. No. 1638/03 (JV 2007/209).

and the social and cultural ties he has developed there, are relevant factors determining the proportionality of an expulsion measures. On the other hand, the Court has also stressed that very serious violent and drug offences may allow expulsion, even when the alien has spent a great part of his life in the host country and did not develop ties with his country of origin.[473]

In case of a 1F applicant who is facing expulsion and invokes Article 8, the respondent state will appeal to the grounds of national security and prevention of disorder or crime to justify the taken expulsion measure. The above mentioned criteria for long-term immigrants can offer guidance to states regarding the balancing of interests and although the question whether the interest of public order outweighs the rights of the alien which will vary according to the specific circumstances of each case, the alleged committed serious crime which led to the exclusion of the asylum seeker will be strongly counted against him. This is also the case with regard to an excluded asylum seeker who stays illegally in the host country and appeals to Article 8 in order to regularise his stay. Important considerations which will be in the disadvantage of the alien concerned are also when he has a history of breaches of immigration law and when family life was created at a time when the person involved was aware that his immigration status was such that the persistence of that family life within the host state was from the outset precarious. In such circumstances 'it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8'.[474]

Thus in both situations, the Court will eventually balance the interest of public order against the rights of the alien. When the Court rules that Article 8 is violated, this does not guarantee, as such, the right to a particular type of residence permit as the Court is not empowered to rule on whether the individual concerned should be granted one particular legal status rather than another, that choice being a matter for the domestic authorities alone.[475] Though several cases of excluded asylum seekers who appealed to Article 8 ECHR have been brought to the Court, there has been no judgment yet. In the next paragraph I will deal with the Court's case law relating to aliens who have been denied on the basis of Article 1F.

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473 See ECtHR 10 April 2012, *Balogun v. UK*, App. No. 60286/09 (EHRC 2012/139 includes annotation from G.G. Lodder).

474 ECtHR 31 January 2006, *Rodrigues Da Silva & Hoogkamer v. the Netherlands*, App. No. 50435/99, para. 39 and 3 October 2014, *Jeunesse v. the Netherlands*, App. No. 12738/10 (NJ 2015/130 includes annotation from B.E.P. Myjer).

475 ECtHR 17 January 2006 *Aristimuño Mendizabal v. France*, App. No. 51431/99, para. 66 (JV 2006/72 includes annotation from PB).

§ 4.6 ECtHR's case law on 1F issues

The cases brought before the Strasbourg Court by applicants who were rejected asylum because Article 1F was held against them, show quite some similarities in their substance as they are almost all versus the Netherlands;[476] they relate to Articles 3, 8 and 13 and concern mainly Afghan nationals who served the KhAD/WAD, which was the intelligence service during the former communist regime in Afghanistan.[477] I will elaborate upon this specific group in Chapter 5 when I will deal with Article 1F in the Netherlands.
To understand the issues the Court had to deal with, it is relevant to know the following:

Until 2011, it was practice in the Netherlands that an exclusion order was imposed on a person against whom Article 1F was held.[478] This is based on Article 67 (1) of the Aliens Act 2000 which provides that a foreign national may be declared an undesirable alien, entailing the imposition of an exclusion order in the interest of international relations and to exert pressure

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[476] Besides the Netherlands, there has been one case against France, ECtHR 1 July 2014, *M.X. v. France*, App. No. 21580/10.

[477] To date, these cases are brought before the ECtHR and by now closed: 19 June 2012, *H. v. the Netherlands*, App. No. 37833/10; 10 July 2012, *I. v. the Netherlands*, App. No. 24147/11; 18 October 2011, *K. v. the Netherlands*, App. No. 33403/11; 4 June 2013, *Naibzay v. the Netherlands*, App. No. 68564/12; 15 September 2005, *Bonger v. the Netherlands*, App. No. 10154/04 (JV 2006/33 includes annotation from B.P. Vermeulen); 13 December 2011, *Betwata Khoushnauw v. the Netherlands*, App. Nos. 28244/10 and 32224/11; 2 November 2010, *Joesoebov v. the Netherlands*, App. No. 44719/06 (Ars Aequi RV20100022 includes annotation from P. Boeles); 10 January 2012, *G.R. v. the Netherlands*, App. No. 22251/07 (NJ 2013/565 includes annotation from E.A. Alkema); 17 March 2015, *M.W. v. the Netherlands*, App. No. 46938/10; 18 April 2012, *Hashimi v. the Netherlands*, App. No. 20507/12; 18 October 2011, *J. v. the Netherlands*, App. No. 33342/11; 14 January 2014, *N.F. v. the Netherlands*, App. No. 21563/08 (NJB 2014/727); 14 January 2014, *Y.A. v. the Netherlands*, App. No. 15439/09; 13 November 2014, *H. and J. v. the Netherlands*, App. Nos. 978/09 and 992/09 (in this case, the applicants also called in Article 6 ECHR) and 30 June 2015, *A.A.Q. v. the Netherlands*, App. No. 42331/05. Currently, there are still cases pending at the Court, among which these have been communicated to the Dutch government: 16 July 2012, *Soleimankheel and others v. the Netherlands*, App. No. 41509/12and 16 October 2009, *G.G.S. v. the Netherlands*, App. No. 53926/09. The latter case is the only one in which also Article 5 of the Convention is invoked concerning the aliens' detention imposed on the applicant. There is one more case worthy to mention. In the case of 11 September 2012, *A.A. v. the Netherlands*, App. No. 66848/10, Article 1F is not hold against the applicant, but she is the wife of an excluded asylum seeker and has invoked Articles 3 and 8 to stop her expulsion to Turkey.

[478] Since the implementation of the Returns Directive in Dutch national legislation in December 2011, the exclusion order is replaced by an entry ban with regard to aliens outside of Europe. The consequences of an entry ban are quite similar to that of an exclusion order, see Chapter 5 on the Netherlands for more on this issue.

on the alien to leave the country. Such an order entails a ban on residing in or visiting the Netherlands. Article 197 of the Dutch Criminal Code provides that an alien who stays in the country while he knows that an exclusion order has been imposed on him or her commits a criminal offence punishable by up to six months imprisonment or a fine. It is up to the Public Prosecutor to decide whether to prosecute or not. An exclusion order may be revoked upon request of the alien.[479]

Furthermore, when a person for reasons based on Article 3 of the Convention cannot be expelled to his country of origin, but pursuant to Article 1F is ineligible for any kind of residence permit, no expulsion order will be issued, at least for as long as these reasons exist. This situation does not lead to a residence title and the alien concerned remains under the obligation to leave the Netherlands on his own will. Eligibility for an eventual residence permit may arise when the Article 3 obstacle is of a sustained nature. In practice, such a situation may arise after a period of unlawful residence of ten years whilst Article 3 continues to obstruct the removal and, without any prospect of change in that situation in the foreseeable future and, where the alien in question has demonstrated that despite his best efforts there is no possibility for him to relocate to a third country and where the continued withholding of a residence permit would be disproportional.
In summary, with regard to Article 3, the complaints were that expulsion would expose the applicant to a real and personal risk of being subjected to treatment in violation of Article 3 if the person were to be returned to this country of origin. In the cases of *I. and Naibzay v. the Netherlands,* the question was raised whether the consequences of denying a residence permit could lead to an Article 3 violation.[480] In relation to Article 8, the general complaint was that the continued denial to issue a residence title while no expulsion took place, violated the right to family life as in most cases spouse and children of the applicants were admitted to the Netherlands and had a lawful stay.[481] In some cases, the applicants referred to the exclusion order and found it to be unjustly imposed in relation to Article 3. In others, the exclusion order was considered to violate Article 8. The reference to Article 13 concerned in all the cases that in the complaints under Articles 3 and 8, no effective remedy was provided.

Up till present, the Court has not delivered a judgment concerning the issues that arose in relation to Articles 3 and 8. It either found the application to be

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479 Aliens Circular *(Vreemdelingencirculaire)* A4/3.

480 In both cases, the Court did not found a minimum level of severity to be present. See § 4.7.

481 ECtHR *H. and J. v. the Netherlands* is the only case in which the applicant called in Article 8 with regard to his private life instead of family life.

manifestly ill-founded or stroke it out of its list of cases.[482]
According to the Court, 'states have the right to control the entry, residence and expulsion of aliens. Neither Article 3 nor any other provision of the Convention or its Protocols guarantees the right of political asylum. Though expulsion may give rise to an issue under Article 3 and imply the obligation not to expel, in the absence of any realistic prospects for the expulsion of the applicant, he cannot claim to be a victim within the meaning of Article 34 ECHR as regards his complaint that the return to this country of origin would violate Article 3. To the extent that the applicant also complains that, pursuant to the exclusion order imposed on him, he is denied a residence permit for as long as he is not removed from the Netherlands, the Court considers that this complaint must be rejected for being incompatible *ratione materiae* as neither Article 3 nor any other provision of the Convention and its Protocols guarantees, as such, give a right to a residence permit'.[483]

With respect to Article 8, the Court expressed that despite an exclusion order being imposed on an applicant barring his formal admission to the Netherlands, as long as the applicant is not under a threat of removal from the Netherlands and thus of being separated from his family in the Netherlands, he cannot be regarded as a victim within the meaning of Article 34 of the Convention for the purposes of Article 8.[484]

Like the complaints on Articles 3 and 8, in all cases, except one, the reference to Article 13 was rejected as unfounded.[485] Though the applicant alleged there had been a violation of his right to family life and did not rely on Article 13, in the *G.R. case*[486], the Court raised of its own will the question whether the right to an effective remedy was denied and eventually ruled in favour of the alien. Contrary to the other cases, Article 8 was not invoked because of a continued denial of a residence title while not being expelled, but for being refused an exemption from the obligation to pay an administrative charge to obtain a decision on his request for a residence permit. The Court found it more appropriate to consider the case under Article 13 by dealing with the question 'whether the applicant had effective access to the administrative procedure by which he might, subject to fulfilling the conditions prescribed by domestic law, obtain a residence permit which would allow him to reside lawfully with his family in the Netherlands'. According to the Court, the applicant had an arguable case under Article 8 and was the procedure for

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482 Redactioneel 2010, pp. 367-369.
483 See the cases of ECtHR *K.; H.; I.;Bonger and Joesoebov v. the Netherlands.*
484 See the cases of ECtHR *I.; K. and Joesobov v. the Netherlands.*
485 ECtHR *H. and J. v. the Netherlands* in which the applicant also referred to Article 6 was also found to be manifestly ill-founded.
486 ECtHR 10 January 2012, *G.R. v. the Netherlands*, App. No. 22251/07 (NJ 2013/565 includes annotation from E.A. Alkema).

obtaining a residence permit 'effective in law' as the applicant was fully entitled to make use of it and that it was capable of yielding the result sought by the applicant. Then the question remained whether it was also 'available in practice' given the financial threshold which the applicant could not meet. To be exempted from paying the administrative charge, the applicant submitted to the Minister for Immigration and Integration, a copy of his wife's most recent social assistance pay slip, issued by the mayor and aldermen of the municipality where they lived. The Minister did not accept the request on the ground that the applicant had failed to submit a declaration of income and assets, verified by the same municipality, along with proof of his and his wife's attempts to obtain funds from other sources and subsequently never considered whether the applicant would qualify for an exemption. The Court expressed that in view of the strict rules on receiving social assistance, it is superfluous to require more documents in addition to the pay slip and judged that the extremely formalistic attitude of the Minister - which was endorsed by the regional court, also deprived the applicant of access to the competent administrative tribunal - unjustifiably hindered the applicant's use of an otherwise effective domestic remedy and therefore violated Article 13.

§ 4.7 Conclusion

Though neither the ECHR nor its Protocols contain the right to political asylum as such, this treaty has become a significant tool for asylum seekers. The initial thought that the Refugee Convention would provide sufficient guarantees and it would not be necessary to include a provision on asylum in the ECHR does not hold, especially in the case of excluded asylum seekers. Several provisions of the ECHR may provide a way out for those who fall outside the scope of international protection. This way, an excluded asylum seeker who is facing expulsion and fears for his life upon return can rely on Article 3. A relevant aspect of this provision is its absolute character, which means that no limitations or interferences are allowed, irrespective of the victim's conduct. To fall under the terms of Article 3, the applicant must show substantial grounds to substantiate that he faces a real risk of being subjected to ill-treatment on return and the ill-treatment must attain a minimum level of severity. An Article 3 complaint will often be submitted together with a request for an interim measure. The issuance of such a measure stops a removal and will allow the applicant to remain in the host country during the proceedings.

Aliens' detention is a familiar phenomenon in Europe in cases where the person is, *inter alia*, considered to be a threat to public order or is suspected to abscond. The state of detention conditions, possibly in combination with the length of period the applicants were exposed to bad living conditions can also lead to a breach of Article 3 ECHR.

With regard to the legality of detention itself, Article 5 is relevant. This provision guarantees the right to physical liberty, except when detention is based on one of the stated grounds, which includes alien detention. To be in line with Article 5, detention should not be arbitrary and in case of an interim measure, authorities cannot claim to detain an alien with a view to removal. A detained alien is entitled to the procedural grounds as laid down in Article 5 (2) to (5). Article 5 is closely connected to 6 and 13 of the Convention and the Court sees Article 5 and 6 to be *leges speciales* in relation to the general requirements of Article 13. In view of the Court's current standing interpretation with regard to Article 6: stating that it does not apply to immigration proceedings, the right to an effective remedy before a national authority as provided under Article 13 is significant. An alien can only refer to the latter when a decision concerning entry, settlement or removal and the consequent threatened expulsion allegedly violates a Convention right. As shown from the Court's case law relating to aliens to whom Article 1F is applied. The relevance of Article 13 for those facing expulsion will often be in the context of Articles 3 and 8. The Convention's provisions regarding procedural rights and guarantees are also reflected in EU law as their equivalents are included in, *inter alia*, the Charter and asylum Directives. The right to family life under Article 8 ECHR plays a role for an excluded asylum seeker when his family members did receive protection and he is facing expulsion and thus separation from them, but as shown from the cases brought to the Court by excluded asylum seekers, the complaints under Article 8 mainly concerned situations in which the alien claimed his illegal stay to be regularised in order for him to remain with his family members. There was a continued denial of a residence permit irrespective of the *refoulement* issues. This situation actually concerns the core of the matter. Though an Article 3 obstacle can stop the removal of the excluded asylum seeker, it does not entail a right to a residence permit. This is also the standard phrase repeated by the Court in each case: 'Neither Article 3 or any other provision of the Convention or its Protocols guarantees the right of a residence permit and as long as the alien is not under a threat of actual expulsion, the Court does not regard him to be a victim for the purposes of Articles 3 and 8 of the Convention'.

The Court disposes of the problem of non-removable asylum seekers who do not receive a legal stay either, by assigning a broad amount of discretion to the states. In the case of the Netherlands, the policy is that after a period of ten years, whilst Article 3 continues to form an obstacle for removal and there is no prospect of change in that situation in the foreseeable future, it should be considered whether the continued withholding of a residence permit is disproportional. I already raised the question whether the consequences of leaving a person to live in limbo for many years, without any entitlement to social support, may lead to a violation of Article 3? This question is interesting within the scope of the Court's case law on Article 3 in relation to

the living conditions of asylum seekers. In the *M.S.S.* case, the Court judged for the first time that the bad living conditions in Greece, in combination with the prolonged uncertainty in which applicant remained and the total lack of any prospects of his situation improving, led to a violation of Article 3 of the Convention.[487]

In the *I. v. Netherlands and Naibzay v. the Netherlands* cases, which both among others, concerned the living conditions of excluded asylum seekers in the Netherlands, the Court did not found a minimum level of severity to be present. In the first mentioned case, the Court stated that no indication was found that the applicant's living conditions in the Netherlands would be comparable to the living conditions in Greece of the applicant in the *M.S.S.* case or that the applicant's current living conditions and/or future prospects, either from a material, physical or psychological perspective, would be of such harrowing hardship.
This reasoning is understandable in view of the Greek authorities' systematic failure to secure adequate living conditions. Though the two men in these cases were staying illegally in the country, did not have any right to social support etc., they did have a family to fall back on. Thus, despite all the difficulties, they were provided with housing which was not the case in *M.S.S.* where the applicant was living on the streets for months and had to survive on his own resources. The assessment of a minimum level of severity is relative and depends on all circumstances of the case. The Court's *Tarakhel* judgment showed that even in case a state does have decent reception conditions for asylum seekers, Article 3 ECHR can stand in the way of removal. Thus, the fact that a minimum level of severity was not found in the two mentioned cases which were brought to Court by excluded asylum seekers does not mean that other cases cannot lead to another outcome. As stated before, there has not been a judgment on any of the cases brought to Court by excluded asylum seekers yet. The fact that the aliens were not under an actual threat of expulsion, resulted in the Court's decision not to deal with the complaints. However, there are still cases pending at the Court and it remains to be seen when the first judgment will be passed.

[487] See also *Rahimi v. Greece* and *Tarakhel v. Switzerland* in which the Court reiterated its approach taken in the *M.S.S* case.

Chapter 5 Application of Article 1F: current policies and their development in the Netherlands

§ 5.1 Introduction

The Netherlands was one of the first signatories of the Refugee Convention and ratified in the Convention on 3 May 1956.[488] The first Aliens Act dates back to 1849 and was replaced by the Aliens Act 1965. The latter Act contained a special asylum procedure based on the Refugee Convention and remained in force for quite some time. The changing influx of migrants to the country, including more and more asylum seekers from the mid-eighties onwards required new regulations to get a better grip on the developments. This led to the introduction of the revised Aliens Act 1994 which aimed to restrict the numbers of procedures regarding admission and removal and reduce the duration of the procedures.[489] In practice, the revised Act of 1994 did not solve the problems regarding the asylum procedure, resulting in the Minister and State Secretary of Justice at the time introducing a legislative proposal to the House of Representatives for a new Aliens Act (Aliens Act 2000).[490] While the revision of 1994 concerned the aliens' policy in general, the focus of the new Act was especially on asylum. The Aliens Act 2000 entered into force on 1 April 2001 and is currently still in force.[491]

This chapter will focus on the application of Article 1F in the Netherlands which is known within Europe for actively dealing with this provision.[492] A great interest in the application of Article 1F started at the end of the 1990s with the arrival of a group of Afghan men who served in the intelligence service named KhAD/WAD. Though these men are not the only ones who have been excluded from being granted asylum; for nearly the last two decades, the ex-KhAD/WAD members have been in the political spotlight with regard to the application of Article 1F. The consequences of exclusion, particularly the situation that these aliens do not qualify for a lawful stay (even in case of a *refoulement* obstacle) and at the same time cannot be removed, gave rise to developing further policy concerning the exclusion clauses. The previous and current policy and legislation on Article 1F within the

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488 The Refugee Convention entered into force in the Netherlands on 1 August 1956.
489 *Dutch Bulletin of Acts, Order and Decrees (Staatsblad)* 1993, 707.
490 *House of Representatives II* 1998/99, 26 732, No. 2.
491 *Dutch Bulletin of Acts, Order and Decrees* 2000, 495.
492 Rafi 2008, p. 381.

legal framework for the assessment of exclusion in the Netherlands will be discussed in more detail, with a particular focus on the post-exclusion phase. After this overview, I will go into the details regarding the situation of the ex-KhAD/WAD members which is still a subject of discussion. Furthermore, attention will be paid to the Dutch jurisprudence regarding some relevant topics with respect to Article 1F followed by a conclusion to this chapter.

§ 5.2 Legal framework

§ 5.2.1 Article 15 of the Aliens Act 1994

Until the introduction of the Aliens Act 2000, Articles 1A and 1F of the Refugee Convention were implemented in Article 15 of the Aliens Act 1965 and later on 1994. Article 15 (1) of the Aliens Act 1994 elaborated on Article 1A of the Refugee Convention which defines a refugee. According to this paragraph, foreigners who came from a country where they had valid reasons to fear persecution because of their religious or political belief; their nationality; or because they belong to a certain race or social group could be admitted as a refugee. Though the definition of Article 1A of the Refugee Convention was not reproduced verbatim in Article 15 of the Aliens Act, it was the intention of the legislator to make the two provisions consistent with each other. This was explicitly repeated in a letter to the Standing Committee of Justice from the Minister of Justice at the time.[493] In a later policy document, the State Secretary of Justice stated that both provisions have a similar category of persons in mind, namely those coming from a country where they have valid reasons to fear persecution because of their religious or political belief; their nationality; because they belong to a certain race or social group. Article 15 of the Aliens Act covered a wider scope of situations as it lacked a time limitation, but with the introduction of the Protocol this was no longer important because the limit in Article 1A of the Refugee Convention ceased to apply.[494]

Article 15 (2) prescribed that admission could be refused for serious reasons on the basis of general interests of the state and, until the end of 1997, it was general practice that aliens to whom Article 1F was applied, were rejected asylum on the basis of paragraph 2. In the policy document mentioned above, the State Secretary gave notice of a new assessment of Article 15 which can be summarised as follows:[495]
First, it was to be judged whether there were serious reasons to consider that the person concerned had committed a crime within the meaning of Article

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493 *House of Representatives* 1973/74, *Proceedings II (Handelingen)*, H. VI, no. 13.
494 *House of Representatives* 1997/98, 19637, No. 295, p. 5-6.
495 Idem, p. 6.

1F of the Refugee Convention. If so, admission was refused and if not, it had to be examined whether the person could be recognised as a refugee under Article 1A of the Refugee Convention. If this question was affirmative, then the circumstances are reviewed within the meaning of Article 15 (2) which is the basis on which admission to the Netherlands was refused.[496]

The latter examination shows that an asylum application is first tested against Article 1F instead of Article 1A of the Refugee Convention, the so-called 'exclusion before inclusion'.
The government's choice for this examination is substantiated by several reasons. In the first instance the practice is based on the thought that there is nothing in the Refugee Convention which deals with Article 1A first, as Article 1F states that the provisions of the Refugee Convention are not applicable to persons who are excluded under this provision. Furthermore, reference is made to Article 14 of the Universal Declaration of Human Rights and the fact that the highest court in administrative cases, the Administrative Jurisdiction Division of the Council of State *(Afdeling Bestuursrechtspraak van de Raad van State)*, supports this view.[497] The last point put forward is that in addition to Article 1F, Article 3 ECHR is also taken into consideration during the assessment which provides a sufficient guarantee that all aspects are taken into consideration in the decision-process.

The exclusion before inclusion practice that is currently still applicable in the Netherlands is not in accordance with the UNHCR's line of thought which believes that 'the exceptional nature of Article 1F suggests that inclusion should generally be considered before exclusion, but that there is no rigid formula'.[498] According to this organisation, 'looking at inclusion before

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[496] Also persons who did not fall under Article 1F and would qualify for a refugee status on the basis of Article 1A of the Refugee Convention could still be refused admission on grounds under Article 15 (2). This is because the State Secretary has the power to make an exception on the policy of admitting an alien as a refugee to the country.

[497] In its judgment of 8 April 1991, the Administrative Jurisdiction Division found that the serious character of Article 1F makes it necessary to find out first whether the Refugee Convention is applicable before looking at the question whether there is a matter of persecution in the sense of the Convention. See also Administrative Jurisdiction Division of the Council of State 27 October 2003, No. 200305116/1 (JV 2003/555) and 4 September 2002, JV 2002/358 in which the court ruled that the UNHCR Handbook as well as the Guidelines on the application of Article 1F do not contain rules which bind the authorities and would lead to a change in their procedure.

[498] In 1998, the UNHCR wrote a letter to the Dutch authorities in which the organisation plead for 'inclusion before exclusion', UNHCR's views on the application of Article 1F of the 151 Refugee Convention: Comments on the letter of the State Secretary of Justice to the House of Representatives, dated 28 November 1997 (document 630201/97/DVB), dated March 1998, *NAV* 1998, pp. 5-6.

exclusion may often be helpful as it prevents unnecessary consideration of Article 1F in cases where non-inclusion arises and enables a fuller understanding of the circumstances and international protection concerns of family members to be addressed. Exclusion may exceptionally be considered without particular reference to inclusion issues where there is an indictment by an international criminal tribunal; in cases where there is apparent and readily available evidence pointing strongly towards the application's involvement in particularly serious crimes, notably in prominent Article 1F (c) cases; and at the appeal stage in cases where exclusion is the question at issue'.[499]

§ 5.2.2 The Sison-case

The first high-profile case referring to Articles 1F of the Refugee Convention and 15 (2) of the Aliens Act concerns Jose Maria Sison, who was Chairman of the Central Committee of the Communist Party of the Philippines (CPP) from 26 December 1968 to 10 November 1977, on which date he was arrested by the dictatorial regime of Marcos and detained until 5 March 1986. He has lived in the Netherlands since 1987. He was granted a residence permit as he worked as a research consultant at Utrecht University, until he applied for political asylum in 1988. The asylum application was refused pursuant to Article 1F by decision of 13 July 1990 after which Sison submitted a request for reconsideration of his case. As no action was taken on this request within the three-month period provided for in Article 34 (2) of the Aliens Act, the request was considered as rejected. Sison made an appeal to the Judicial Division of the Council of State[500] against this fictive rejection which nullified the decision of the State Secretary of Justice. According to the court, the State Secretary did not sufficiently show which supposed acts of Sison led to the exclusion under clause 1F (c).
On 26 March 1993, the State Secretary again rejected Sison's request for reconsideration of his case which was this time based on Article 1F (a) and (b). The main arguments for the rejection were that:

- it appeared from a letter of the Internal Security Service *(Binnenlandse Veiligheidsdienst)* of 3 March 1993 that Sison was the chairman and leader of the CPP at that time. Furthermore, that the military arm of the CPP, the New People's Army (NPA), fell under the CPP and, therefore, under Sison;
- The Internal Security Service had ascertained that Sison was in fact in charge of the NPA and that the NPA - and those connected to it, were responsible for a great number of terrorist acts in the Philippines;

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499 UNHCR Background Note 2003, para. 100.

500 From 1 April 1994 on, the Judicial Division of the Council of State is changed into the Administrative Jurisdiction Division of the Council of State.

The State Secretary also pointed out the purge that took place in 1985 among the CPP and NPA of which an estimated 800 members of these organisations were murdered without due process. Above all, according to the State Secretary, the Internal Security Service, had ascertained that the CPP/NPA maintained contacts with terrorist organisations over the whole world and there were also observations of personal contacts between Sison and representatives of similar organisations. Furthermore, it was stated as an alternative in the decision that even if Sison was eligible for protection under the Refugee Convention, he would still be refused admission for the sake of protecting the interests of the State, in particular in relation to its responsibilities to other countries.

Sison appealed to the Administrative Jurisdiction Division which nullified the decision of 26 March 1993.[501] The highest court stated that the mentioned materials made it very assumable that in the period of the contested decision, Sison indeed was the chairman and leader of the CPP; they also justify the conclusion that the NPA was under the CPP; that Sison tried to give direction to the NPA while he was residing in the Netherlands and that the NPA was responsible for a great number of terrorist acts in the Philippines. However, the court did not find the material offered sufficient evidence to substantiate the fundamental judgment that Sison had given direction and carried responsibilities for such activities so that Article 1F should to be applied. Consequently, the court ruled that the State Secretary on the basis of the above-mentioned material could not deny Sison the protection of the Refugee Convention. Moreover, it was decided that the general interest of Dutch society could not be a reason for refusing Sison admission as he would face the risk of undergoing treatment contrary to Article 3 ECHR upon his return to the Philippines. What the court actually said with this judgment is that in a situation where a person is exposed to a danger as in the scope of Article 3, other interests should not be considered and the person cannot be removed. This does not prejudice the possibility to expel the person to another country where his admission would be guaranteed.

The answer of the State Secretary came in a decision of 4 June 1996 in which admission to the country was again refused on grounds of general interests of the state.[502] Although the State Secretary ordered Sison to voluntarily leave the Netherlands, at the same time the State Secretary decided that Sison would not be removed to the Philippines as long as he fears persecution in the sense of the Refugee Convention or treatment which will breach Article

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[501] Administrative Jurisdiction Division of the Council of State 21 February 1995, App. No. R02.93.2274.

[502] Decision of 4 June 1996, reference Immigration and Naturalisation Service: 8702.16.0027.

3 ECHR. No other country was willing to admit Sison and as Article 3 does not entail a right to stay in the Netherlands, in practice this decision meant that he would be living as an 'illegal' without a status. It was for the first time that the practice of 'no removal and no admission' was used.[503] Sison appealed against the State Secretary's decision to refuse admission, but by order of 11 September 1997, this appeal was dismissed.[504] Though the district court confirmed the practice of 'no removal and no admission' which was created, the State Secretary stated that such a situation is in general undesirable and should be restricted to exceptions. Currently, Sison is still residing in the Netherlands. Officially he must leave the country but, at the same time, the authorities cannot remove him on the basis of Article 3 of the ECHR.[505]

§ 5.2.3 Policy document of 1997

Though the Sison-case is the first high-profile case concerning the application of Article 1F of the Refugee Convention in the Netherlands, the provision draw the attention of political life at the end of the 1990s regarding a group of Afghan asylum seekers. The first influx of Afghan asylum seekers who came to the Netherlands between 1978 and 1992 were mainly students and intellectuals who fled their country because of the repression of the regimes collaborating with the Soviets. After the Mujahidin took over power in 1992, heads of the communist regime, such as ministers, generals, KhAD/WAD-officials who were the oppressors of the first influx asylum seekers, fled abroad, including to the Netherlands. The fact that these persons were seen as victims by the Dutch authorities and no critical admission policy was applied to them led to unrest among other Afghan refugees. At the end of 1994, the question was debated in the House of Representatives and it came to light that eight high officials of the former Afghan communist regime were residing in the Netherlands and that the State Secretary agreed that these persons, who had committed serious crimes, should not reside in the country. Furthermore, the State Secretary stated that if more information were to emerge, the matter would be further investigated. According to an article in the 'Vrij Nederland' news magazine, there were at least 35 leaders of the communist regime in Afghanistan residing in the Netherlands and

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503 Mus 1996.

504 District Court The Hague (REK) 11 September 1997, *AWB* 97/4707 *(Sison III)* (RV 1997, 9 includes annotation from B.P. Vermeulen).

505 Sison did not receive residency under the general pardon of 2007 either, which the highest court found to be a correct decision Administrative Jurisdiction Division of the Council of State 12 May 2011, App. No. 201006689/1/V1. See also Administrative Jurisdiction Division of the Council of State 29 January 2014, App. No. 201208507/1/A3. This case concerned a request from Sison to the mayor of Utrecht for a travel document for refugees. This was refused and confirmed by the highest court on appeal.

nothing had been done to investigate the matter.[506] After the publication of the article, parliamentarians questioned the State Secretary regarding the matter,[507] who eventually produced a document which established the policy framework concerning the application of Article 1F.[508]

In addition to what the State Secretary said about the assessment of Article 15 of the Aliens Act as prescribed above, the State Secretary stated that given the consequences of Article 1F, the provision should be interpreted restrictively. In other words, that it should be applied only after a careful examination and thorough motivation has been carried out. Other relevant principles stated by the State Secretary were that:

- When the available information regarding the function of the person concerned; his activities; type of organisation where he worked as well as the political situation in the country of origin leads to Article 1F, there will be no hesitation to apply the provision. Moral and legal obligations of the State to prevent serious crimes do not match with accepting aliens, who committed these crimes, as refugees;
- She will make us of her power to declare persons to whom Article 1F is applied, as undesirable aliens and inform the Public Prosecution Service of the exclusion.[509] It is emphasised that criminal prosecution is not necessary for the application of Article 1F;
- The exclusion ground under Article 1F (c): He has been guilty of acts contrary to the purposes and principles of the United Nations will not be used as an independent ground, but mostly in combination with Article 1F (a);
- The personal and knowing participation test which has been developed in Canadian case law for the examination of complicity by being a member of an organisation is useful for Dutch practice.[510] This means, for example, those cases where a person, whether highly placed or not, has been involved in a particularly cruel organisation and was aware of sharing a mutual goal with his colleagues, has an involvement in the acts, even though he did not commit them himself. There is an exception for individuals who can prove on the basis of their activities that they had dissociated themselves from the acts of the organisation. This test will be explored later on in the chapter;

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506 Vrij Nederland is a weekly news magazine. The article in question was titled: 'Het barst hier van de oorlogsmisdadigers', 22 February 1997.

507 *Appendix to the Proceedings (Aanhangsel van de Handelingen)* 1996/97, No. 920.

508 *House of Representatives* 1997/98, 19637, No. 295 (Letter from the State Secretary of Justice).

509 See Van Eik 2008, pp. 4-11.

510 See footnote 239.

- A person who is excluded on the basis of Article 1F will not receive a provisional residence permit based on the general situation in the country of origin;
- Family members can apply for asylum on their own records and in the case of a refugee status being granted to a family member, a 1F applicant is not eligible for a derivative status. It is also not possible for a 1F applicant to be admitted on the basis of family reunification/formation or Article 8 ECHR;
- As was already shown in the Sison-case, when Article 3 ECHR prohibits removal from the Netherlands, this does not entail a right to stay in the country.

§ 5.2.4 New Aliens Act 2000

Besides the great interest for Article 1F at the end of the 1990s, the asylum policy in the Netherlands in general received a lot of attention too. This had, *inter alia*, to do with the large number of asylum applications. In 1998, the number of applications increased to 45.217, which made the Netherlands one of the European countries with the highest number of applications per year. In the same year, a new government was formed which announced that the Aliens Act would be amended, focusing on among others, a faster asylum procedure. On 1 April 2001, the New Aliens Act 2000 entered into force and replaced the Aliens Act 1994 in its entirety.[511] Together with the new Act, also the Aliens Decree *(Vreemdelingenbesluit)* and Aliens Regulations *(Voorschrift Vreemdelingen)* came into effect. The Aliens Circular was drawn up on the basis of these regulations, which consists of policy rules and general directions for all officials who deal with the implementation of the Aliens laws. Unless indicated otherwise in the Aliens Act, the General Administrative Law Act *(Algemene Wet Bestuursrecht)* also applies to proceedings on admission and residence.

With the Aliens Act 2000, one residence permit for asylum was introduced for all asylum related grounds. The permit is initially issued for a period of five years after which a permit for an indefinite period of time can be obtained.[512] Article 29 (1) (a) of the Aliens Act states that 'a residence permit for a specific time limit can be granted to the alien who is a refugee as stated in Article 1 of the Refugee Convention'.[513] However, when a person falls under Article

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511 See Scheltema 2006 <https://www.wodc.nl/onderzoeksdatabase/voorbereiding-nulmeting-evaluatie-vreemdelingenwet-2000.aspx> (last accessed on 21 September 2015).

512 Article 28 (2) of the Aliens Act 2000.

513 In total, 6 grounds for admittance were laid down in Article 29 of the Aliens Act. With effect from 1 January 2014, the grounds of national protection for humanitarian reasons and national protection for special categories are deleted. Besides the refugee status, the *refoulement* risk; family reunion and extended family reunion are still present.

1F, he becomes ineligible for a residence permit under Article 29 (1) (a). Pursuant to Article 3.107 of the Aliens Decree, the person concerned can neither be granted a residence permit on any of the other grounds referred to in Article 29 (1) of the Aliens Act.

§ 5.2.4.1 Grounds for refusal of asylum

The Netherlands fully participates in harmonising its domestic legislation with EU asylum Directives which means that the Directives of the first-phase as well as the recasts are implemented in its domestic legislation. Before the implementation of the recast Asylum Procedures Directive in national legislation on the 20th of July 2015, Articles 30 and 31 of the Aliens Act contained the grounds for refusal of an asylum application. From this date on, Article 30 is replaced by four new provisions.[514] The current Article 30 prescribes that an asylum application is not considered when another country is responsible for handling the application. The following provisions contain grounds in which the State Secretary may declare an application to be inadmissible (30a); manifestly unfounded (30b); or to discontinue the examination (30c). Under the circumstances which are laid down in Article 30b (1), the State Secretary may consider the case to be manifestly unfounded. This means that the occurrence of a situation as in paragraph 1 does not automatically lead to a rejection, but it does place a heavier burden of proof on the asylum seeker who has to make plausible that he needs protection. It is relevant to mention within the context of Article 1F of the Refugee Convention that Article 30b (1) (j) contains the ground for constituting a danger to public order or national safety. According to Article 31 (1), an asylum application will be rejected as unfounded in case the alien has not made it plausible that his application is grounded on circumstances, which on its own, or in connection with other facts, constitutes a legal ground for the issuance of a permit. It also follows from this general refusal ground that the it is up to the applicant to make plausible that his/her application is eligible for granting a permit on one of the grounds stated in Article 29 of the Aliens Act 2000. Furthermore, paragraph 2 of this provision prescribes that the applicant has to submit as soon as possible all the elements needed to substantiate the application for international protection and that in cooperation with the applicant, the Member State is responsible for assessing the relevant elements of the application.

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[514] Article 30 contained four mandatory refusal grounds and when one of these grounds applied, the application was denied. These grounds were that: another country is responsible for handling the application; the alien has already a lawful residence; as long as another procedure is in progress and the alien has a lawful residence on the basis of this procedure; when the alien on the basis of a takeover agreement will be transferred to a third country of earlier residence.

Under sections C2/5 to 7 of the Aliens Circular, Articles 30 to 31 are specified, in which Article 1F is dealt with under C2/7.10.2. Aspects such as the grounds of Article 1F, burden of proof and responsibility with a focus on child soldiers, Article 3 ECHR and also the family members of persons to whom the provision is applied are discussed.
The examination of an asylum application which is carried out by the Immigration and Naturalisation Service *(Immigratie en Naturalisatiedienst, IND)*[515] can briefly be stated as following:

After the review of the case against the refusal grounds as laid down in the Aliens Act, it is first considered whether there are serious reasons to believe the asylum seeker has committed a crime within the meaning of Article 1F. If this question is affirmative, the denial of the asylum application will be based upon Article 31 (1) in conjunction with 30b (1) (j) of the Aliens Act. This means that the person is not eligible for protection under the Refugee Convention and consequently no residence permit will be granted on the basis of Article 29 (1) (a) of the Aliens Act. If the answer to the question is negative, it will be considered whether the asylum seeker falls under one of the categories under Article 29 (1) or if there are other reasons based on Article 30b (1) of the Aliens Act which can lead to refusal of the application. Though the asylum seeker has to substantiate his claim for protection , when it concerns the application of Article 1F, it is the duty of the authorities to prove that there are 'serious reasons', according to which it is assumes the person has committed one of the crimes prescribed under its limbs. Further explanations regarding the grounds for exclusion are given in the Aliens Circular.[516] With regard to the crimes stated under clause (a) alliance is sought with the definitions as laid down in the Rome Statute and used by the ICC. Further, certain crimes are summed up which are by definition considered to be serious non-political crimes in the sense of Article 1F (b), namely: murder, killing and rape; war crimes, crimes against humanity, torture, genocide and crimes, which fall within the description of any international instrument, which excludes the political offence exception or the status of refugee.[517] The last exclusion ground clause (c) was not used as an independent exclusion ground until 2006 and has been used very rarely. Acts against the purposes and principles of the UN are activities specifically identified as such by the UN Security Council or General Assembly, as well as the International Court of Justice. In addition, crimes which have been made punishable by the

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[515] The IND is part of the Ministry of Justice where the State Secretary is responsible for immigration issues.

[516] C2/7.10.2.1 - C2/7.10.2.3.

[517] With regard to clause (b) also attention is paid to the question when a crime is considered to have a political character and also to purely political offences directed to the State such a high treason and interference with elections, which do not lead to exclusion.

Rome Statute towards the ICC are also against the principles and purposed of the UN. The Circular also explains that Article 1F (c) should be used for high-level functionaries or persons who were responsible for the carrying out activities falling under clause (c) which means that persons working for a state entity had to be active at a level that they were aware of the position their state occupied within the international community or they must be aware of the purposes and principles of the UN because of their personal background. The latter approach also counts for non-state actors.[518]

§ 5.2.4.2 Burden of proof

The basic principle regarding the burden of proof is that an individual assessment has to take place for each asylum seeker. In case of assumptions of a possible 1F application, the file is referred to the IND's specialised 1F-unit which is responsible for investigating and deciding on such cases. This burden of proof does not meet the standard of proof as used in criminal law but has to be motivated carefully. When the 1F-unit believes that there are serious reasons for Article 1F to apply to the alien, it is then up to the person in question to give a reasoned refutation of the assumption. The decision whether a person meets the conditions under Article 1F is based on the 'personal and knowing participation test', thus if the person knew or must have known about the criminal offence and whether he personally participated in a certain manner.[519]

According to the Circular,[520] knowing participation is present when:
a) The alien was employed by an organ or organisation which, according to influential reporting has committed in a systematic or widespread manner crimes set out in Article 1F during the time period of his employment unless he can prove to be a significant exception;
b) The alien was employed in an organisation of which the Minister has determined that certain categories of persons belonging to that organisation will be considered to fall under Article 1F unless they can prove themselves to be a significant exception;
c) An alien has participated in activities, which he knew or should have known, were activities as set out in Article 1F.

Personal participation is present when:
a) It is apparent that the alien had personally committed a crime as set out in Article 1F;
b) A crime as set out in Article 1F has been committed under the order or responsibility of the alien;

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518 Rikhof 2012, pp. 362-363.
519 See Wijngaarden 2008 for more on the question of evidence in 1F applications.
520 See C2/7.10.2.4.

c) The alien has facilitated crimes as set out in Article 1F in the sense that his commission or omission has contributed substantially to the crime;[521]
d) The alien belonged to a category of persons within an organisation, of which the Minister has determined that certain categories of persons belonging to that organisation will be considered to fall within the scope of Article 1F unless he can prove to be a significant exception.

Within the context of the burden of proof it should be noted that the defence of superior orders, duress and self-defence which may take away liability are set out in the Circular[522] and those below the age of fifteen are not held responsible for acts as prescribed under Article 1F and consequently, this provision is not held against them.[523] In case of child soldiers between the ages of fifteen to eighteen, several circumstances such as, the age of the child at the moment of joining the army, consequences when refusing to join the army and the forced use of drugs and/or medication are taken into account for the assessment of a knowing participation.[524]

§ 5.2.5 Post-exclusion phase

As expressed earlier, an Article 1F application leads to no residence permit for asylum being issued based on one of the other grounds under Article 29 of the Aliens Act 2000. Additionally, Article 3.77 (1) (a) of the Aliens Decree prescribes that a person who falls within the scope of Article 1F of the Refugee Convention will not receive consideration for a regular residence permit either. Thus, the path for claiming a right to stay in the Netherlands seems to be closed for the 1F applicant. When it turns out in retrospect that Article 1F has erroneously not been applied to an alien, an issued residence permit can still be withdrawn or not renewed.[525] Before such a decision is taken, the alien must first be given the opportunity to react to the findings.[526] Pursuant to the provisions of the Benefit Entitlement (Residence Status) Act *(Koppelingswet)* and Article 10 of the Aliens Act an alien who does not have lawful residence in the Netherlands is not entitled to any benefits in kind, facilities and social security benefits issued by decision of an administrative authority. Derogation is possible if the entitlement is related to education, the provision of care that is medically necessary, the prevention of situations

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521 A substantial contribution means: 'which had a factual effect on the commission of the crime and which would likely not have taken place if nobody had fulfilled the role of the person concerned or if the person concerned had taken the opportunity to prevent the crime'.
522 C2/7.10.2.5.
523 Kloosterboer 2008, pp. 430-437.
524 See District Court The Hague 4 May 2005, *AWB* 04/22429; 12 January 2006, *AWB* 05/7166 and 17 February 2005, *AWB* 04/23019.
525 Article 32 of the Aliens Act 2000.
526 See C13 of the Aliens Circular.

that would jeopardise public health or the provision of legal assistance to the alien. According to Article 45 (1) of the Aliens Act, refusal to grant asylum entails that the person is required to leave the Netherlands voluntarily and, if he does not do so on his own will, will be removed by the authorities. To facilitate expulsion, aliens can be held in aliens' detention. The Aliens Act 2000 allows, on the one hand, for the detention of irregular migrants and asylum seekers at the border to prevent them from formally entering the territory (Article 6) and, on the other hand, for the detention of those who have already entered the Netherlands, such as rejected asylum seekers (Article 59). Special detention centres are in use for the administrative detention of aliens whose detention can last for six months and extended with another maximum of twelve months.[527] Though a rejection basically means the removal of a person, in practice this is often not realizable for several reasons, *inter alia*, if the alien does not have the required documents to leave or if it amounts to the violation of Article 3 ECHR. When the latter is the case, it is up to the asylum seeker to make a reasonable case for the fear of a real risk of exposure to torture, inhuman or degrading treatment or punishment in his home country. If the alien manages to do this, it does not entail a right to stay in the Netherlands and he remains under the obligation to leave the country voluntarily. Though aliens who cannot leave the country because of Article 3 ECHR will not be expelled by the authorities as long as the reasons for it exist, they are considered as illegal residents who do not have the right to stay in a reception centre or make use of other basic facilities as stated above. This leads to distressing situations for prolonged periods of time.[528] Within this context, the European Committee of Social Rights (ECSR)[529] has given two decisions in cases instigated against the Netherlands. The decisions are the result of a collective complaint which came from the Conference of European Churches concerning the fundamental social rights of undocumented adults[530] and the European Federation of National Organisations working with the Homeless which dealt with the homeless and access to shelter.[531]

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527 This maximum period of aliens' detention is in accordance with the EU Returns Directive.

528 See Reijven and Van Wijk 2012, pp. 26-30 and 2014 pp. 259-263, who deal with the consequences of Article 1F in the post-exclusion phase, especially in case of 'no removal, no admission'.

529 This Committee rules on the conformity of the situation in states with the European Social Charter which was adopted in 1961, the 1988 Additional Protocol and the Revised European Social Charter of 1996. The Charter is a Council of Europe treaty which was established to support the ECHR which is principally for civil and political rights, and to broaden the scope of protected fundamental rights to include social and economic rights. Certain organisations are entitled to lodge complaints with the Committee which examines the complaint and, if the formal requirements have been met, declares it admissible.

530 Adoption: 1 July 2014, Complaint No. 90/2013.

531 Adoption: 2 July 2014, Complaint No. 86/2012.

Under the European Social Charter, homeless persons are those who legally do not have at their disposal a dwelling or another form of adequate housing in terms of Article 31 (1). In light of the Committee's established case law, shelter must also be provided to adult migrants in an irregular situation, even when they are requested to leave the country and even though they may not require that long-term accommodation in a more permanent housing be offered to them. In its decisions, the Committee recalls that the right to emergency shelter and to other emergency social assistance is not limited to those belonging to vulnerable groups, but extends to all individuals in a precarious situation pursuant to their human dignity. The ECSR considers that the legislation and practice of the Netherlands fails to ensure access to community shelter for the purpose of preventing homelessness. It finds that the practical and legal measures denying the right to emergency assistance accordingly restrict the right of adult migrants in an irregular situation and without adequate resources in the Netherlands in a disproportionate manner which leads to the violation of Articles 13 (4) and 31 (2)[532] of the Charter.[533] The ECSR's decisions are not binding but can be seen as authoritative interpretations which are of importance in procedures before national courts.[534]
The next step in the procedure after the Committee's decision is that the report on the matter is forwarded to the Committee of Ministers which has to adopt a resolution. Though such a resolution is not binding either, the Committee of Ministers may urge the state to improve its monitoring of the implementation of the resolution and ask the government to inform it of the action taken.

The Dutch authorities found that the ECSR's interpretation was contrary to the Charter in view of paragraph 1 of its appendix which limits the Charter's scope to alien's who have a lawful stay in the state or work in the state concerned. The State Secretary expressed not to change anything in the current legislation and policy until a resolution was adopted by the Committee of Ministers regarding the matter.[535] In the meantime, the Central

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[532] In a previous decision which concerned children unlawfully present in the Netherlands, 27 October 2009, *DCI v. the Netherlands*, Complaint No. 47/2008 (NJCM 2010 includes annotation from A. Buyse) the ESCR had also ruled that the situation in the Netherlands constituted a violation of Article 31 (2). According to the Committee, 'State Parties are required, under Article 31 (2), to provide adequate shelter to children unlawfully present in their territory for as long as they are in their jurisdiction. Any other solution would run counter to the respect for their human dignity and would not take due account of the particularly vulnerable situation of children'.

[533] In the case relating to complaint no. 86/2012, the Committee found that Articles 13 (1), 19 (4) (c) and 30 of the Charter were also violated.

[534] The Central Appeals Tribunal 21 July 2006, App. No. 03-3332 ANW.

[535] Letter from the State Secretary of Justice to the House of Representatives dated 18 December 2014, ref. 599478.

Appeals Tribunal (for the public service and for social security matters)[536] gave two judgments in provisional relief cases involving the decisions of the ECSR. The municipality of Amsterdam has been instructed to immediately offer a number of homeless aliens who have exhausted all legal means food, shelter and clothing (known in Dutch as 'bed, bad en brood regeling').[537] Also the District Court The Hague[538] took the Committee's decisions into consideration and ruled that denying an asylum seeker who has exhausted all legal procedures access to any type of accommodation, food and clothing, infringes on the respect for human dignity in such a way that makes the normal development of private life impossible: on the basis of Article 8 ECHR, the state has the obligation to offer applicant food, shelter and clothing.[539] The State Secretary expressed the intention to lodge an appeal against the district court's judgment and promised to carry out the court's judgment pending the appeal.[540] The answer where the authorities were waiting for came at the 15th of April 2015 with the Committee of Ministers' adopted Resolution CM/ResChS(2015)5.[541] Though one hoped that the resolution would bring clarity to the situation, the Committee did not make a clear recommendation to the Dutch government. It only requested the government to report on any possible developments on the issue. Though the governing parties differ in thoughts on the matter, they eventually agreed to temporarily maintain the basic necessary help to illegal asylum seekers who have exhausted all legal means with the restriction that it will be centralized and provided by only five large cities and the asylum seekers' centre in Ter Apel.[542]

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536 The Central Appeals Tribunal (for the public service and for social security matters) is the English translation of Centrale Raad van Beroep.

537 Central Appeals Tribunal 17 December 2014, App. Nos. 14/5507 WMO-VV, 14/5453 WMO-VV, 14/5444 WMO-VV.

538 District Court The Hague 23 December 2014, *AWB* 14/18686.

539 See also the same court's judgment of 8 September 2015, *AWB* 15/1924 in which is reiterated that the right to private life on the basis of Article 8 ECHR can under circumstances impose obligations on a state in order to safeguard that right. The court expressed that though the decisions of the ECSR are not binding, they are significant for the interpretation of provisions of the ECHR, including Article 8. The applicant in this case did not have a legal stay in the country, was not able to support oneself and not entitled to social service benefits either. The court considers her to be part of the group as decided on by the Committee which makes that withholding her from food, shelter and clothing leads to a violation of Article 8 ECHR. With regard to the government's argument about the scope of the Charter, the court finds that the Committee has discerned this and accepted an exception for this situation.

540 *Appendix to the Proceedings*, 2014/15, No. 1015.

541 Resolution CM/ResChS(2015)5 *Conference of European Churches v. the Netherlands*, Complaint No. 90/2013.

542 See § 8.3.2 for more on this issue.

In addition to the fact that the excluded asylum seeker is not entitled to any rights, it was practice that he was declared an undesirable alien, entailing the imposition of an exclusion order which aims to prevent the 1F applicant from obtaining protection in the Netherlands. Thus, while the alien cannot be expelled due to *refoulement*, his residence in the country is made punishable by law.[543] In accordance with its discretionary powers, the Public Prosecution Service decides in each individual case whether to prosecute or not. If it does, the alien risks being put into custody for a maximum period of six months or a maximum fine of EUR 8,100.[544] There has been a change since the implementation of the Returns Directive in national legislation in December 2011. A heavy entry ban[545] instead of an exclusion order is now imposed on aliens without a lawful stay and who are considered to be a danger to public order/safety (including those to whom Article 1F applies). The latter is now applicable to EU citizens who find themselves in the same situation.[546] An alien who is subject to an entry ban cannot stay lawfully in the Netherlands and other EU countries for the duration of the ban. Violating the ban may, similarly as the exclusion order, lead to six months imprisonment or a fine of maximum EUR 7,800. An entry ban can be withdrawn ex officio or upon request of the alien concerned in the case where the alien makes demonstrable that he left the Netherlands and is not residing in another EU country. In the situation of an excluded asylum seeker who cannot return to his home country, it will be a difficult task to fulfil the criteria to lift the ban.[547] An exclusion order may also be lifted upon request of the alien concerned, when there are special facts and circumstances which make the alien's interest prevail over the public interest. In a case where the alien refers to Article 3 ECHR for revocation, the IND examines whether *refoulement* is a sustainable obstacle and, if so, whether the consequences for the alien of maintaining the exclusion order would be disproportional when weighed up against the interest of the Dutch State. The term 'sustainable obstacle' assumes a similar period of ten years as used in the durability and proportionally-test *(De duurzaamheids- en proportionaliteitstoets)* which will be discussed in the following paragraph. Eligibility for an eventual residence permit may arise during this test when withholding a residence permit is considered to be disproportional.

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543 Boeles 2008, pp. 396-402.

544 Article 197 of the Criminal Code.

545 An entry ban counts normally for a period of max. 5 years, while a heavy entry ban is imposed for a period between the five and twenty years depending on the situation.

546 See Boeles 2010, pp. 531-537.

547 According to data from the State Secretary of Justice, around 90 excluded aliens were imposed a heavy entry ban in 2013; see *House of Representatives* 2014/2015, 34000 VI, No. 4. See also Research and Documentation Centre, 'The fate of the entry ban', (*Het lot van het inreisverbod. Een onderzoek naar de uitvoeringspraktijk en gepercipieerde effecten van de Terugkeerrichtlijn in Nederland*) The Hague, 2014.

§ 5.2.6 Durability and proportionality-test

According to section C2/7.10.2.6 of the Aliens Circular it is first to be judged whether a) Article 3 ECHR offers a sustainable obstacle against removal to the country of origin, and if so; b) whether a permanent denial of a residence title would be disproportionate in the particular circumstances of the case.
The term 'sustainable obstacle' indicates that the alien has been living in the Netherlands for ten years without a permit in a 'no removal, no admission situation', in which a removal would lead to a breach of Article 3; that there is no prospect of change in the circumstances of the alien within a 'not too long period of time' and removal to another country than that of the country of origin is not possible, despite sufficient efforts by the alien to fulfill the obligation to leave the Netherlands.[548] With regard to the latter situation, the IND expects the alien to undertake serious attempts to leave to another country with which he possibly has some bonding or has resided in the past.[549] When the question under section a) can be answered in the affirmative it is up to the alien to make a reasonable case for his situation which should be exceptional. On the basis of the information given by the alien, it will be assessed whether withholding a residence permit is disproportionate.[550]

Though the principle in Dutch policy regarding Article 1F is that no residence permits will be issued to those who are excluded from asylum, an exception can be made in cases where the above described 'durability and proportionality-test' turns out positively for the alien.
The mentioned test has been introduced into the Aliens Circular in reaction to case law of the Administrative Jurisdiction Division of the Council of State of 2004.[551] The highest administrative court did not specify a certain period of time which would identify the stay of the alien in such a situation as sustainable, but spoke about 'a great number of years'. The period of ten years was first mentioned in the Advisory Committee on Migration Affairs' *(Adviescommissie voor Vreemdelingenzaken - ACVZ)* advisory report of 2008[552]

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548 The period of ten years starts from the date of the first asylum application and the phrase 'not too long period of time' remains vague as it is not clear what it means.

549 See letter from the IND, Department of Implementation policy *(Uitvoeringsbeleid)* to lawyer Ms. Van Eik, dated 27 August 2010.

550 Sharma 2009, pp. 110-124.

551 Administrative Jurisdiction Division of the Council of State 2 and 9 June 2004, App. Nos. 200308871/1 and 200308511/1 and reaffirmed in judgment of 18 July 2007, App. No. 200701663/1.

552 Advisory report from the Advisory Committee on Migration Affairs: Article 1F of the Refugee Convention in the Dutch Immigration Law *(Artikel 1F Vluchtelingenverdrag in het Nederlands Vreemdelingenrecht)* The Hague, May 2008. The ACVZ is an independent committee that advises the Dutch Government and Parliament on immigration law and policy. The Committee was installed on 28 November 2001 as a result of the Aliens Act 2000. The advising report from the Committee on Article

and later on included in the Aliens Circular. Though the test seems to offer a way out for those who are residing illegally for quite a long period of time, the practice shows that it is difficult for an alien to meet the conditions and assumed to be in a special situation. According to recent data from the State Secretary it is unknown how often an appeal is made to the durability and proportionality-test, but up to April 2014 the authorities have accepted the excluded asylum seeker's situation to be exceptional in 10 cases.[553]

§ 5.2.7 Figures on 1F

To put the 10 cases (in which the excluded aliens succeeded the durability and proportionality-test) in a context it is relevant to have knowledge regarding the total numbers of 1F applications. The figures of the Ministry of Justice regarding 1F are based on data from the Immigration and Naturalisation Service Information System (INDIS) and the municipal personal records database. According to data published in a parliamentary report dated 14 April 2014, around 870 aliens in total have been denied asylum on the basis of Article 1F from 1992 until 2013. In the year 2014, around 171 investigations were carried out and 50 aliens were actually refused under Article 1F.[554] These exclusions happened during the application for asylum or a regular procedure or based on a withdrawal of a permit. According to the State Secretary the top five nationalities were Afghans, Iraqis, Turks, Angolans and Iranians.[555] It is important to note that these numbers only concern aliens who are excluded on the basis of Article 1F and not their family members. There are no recent data available regarding the position of family members.[556]

With regard to the question how many excluded asylum seekers have left the Netherlands, a distinction can be made between the periods until 2008 and from 2009 onwards.
According to data published in the 2008 policy paper regarding the application of Article 1F, of the about 700 persons who had been objected Article 1F, roughly 350 excluded asylum seekers were still residing in the Netherlands.[557] The State Secretary assumes that this means that 350 aliens must have left the country. However, as the latter group includes aliens who

1F dates from May 2008. It is to be noted that the Committee also issued an earlier report on 1F in 2001.

553 *House of Representatives* 2013/14, 19 637, No. 1808.

554 Letter from the State Secretary of Justice to the House of Representatives 3 March 2015, No. 618655.

555 Idem, p. 15.

556 For more details regarding figures relating to family members until 2008 see Note concerning the application of Article 1F of the Refugee Convention, 6 June 2008 *(Notitie betreffende de toepassing van artikel 1F Vluchtelingenverdrag)*, pp. 5-9.

557 Ibidem.

left for an unknown destination and are not under governmental supervision, it is not known whether they have actually left the country.
From January 2009 until March 2014, 250 excluded asylum seekers were removed from the caseload of the Repatriation and Departure Service *(Dienst Terugkeer & Vertrek- DT&V)* which coordinates the actual departure of foreign nationals without the right of residence in the Netherlands.[558] With regard to around 190 aliens it is not known whether they have actually left the country as they have left for an unknown destination and are not under governmental supervision. From the 250 aliens, around 70 had an Article 3 ECHR obstacle.[559]

Though the aliens in whose case Article 3 was found to be an obstacle cannot be removed by the authorities, they still have a legal obligation to leave the country on their own. In practice it proves to be difficult to find a third country which is willing to receive them, which still maintains their situation of 'no removal, no admission'.[560] Those persons in whose case the *non-refoulement* principle is not at issue and who have exhausted all remedies also have the legal obligation to leave the Netherlands. Additionally, they may be forced to return and are required to cooperate with DT&V. The fact that these aliens are still in the country is due to different impediments, such as not having the right documents for removal or the fact that the alien or his home country is not cooperative for the repatriation.

Formally, both categories have the option to request for a non-fault permit *(Buitenschuldvergunning)* which may be granted to aliens who, through no fault of their own, cannot leave the Netherlands. Such a permit can also be granted at the initiative of the authorities. In both cases, on the basis of a compelling recommendation from the DT&V, the IND assesses whether all conditions have been met. To obtain such a permit, the alien must demonstrate that the diplomatic representation of his country of origin or a third country does not provide him with documents to return. In its report on the non-fault policy, the Advisory Committee on Migration Affairs states that 'the permit is regarded by many as problematic and that the impression exists that it is virtually impossible to meet the conditions governing the

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558 <http://english.dienstterugkeerenvertrek.nl/About_us/> (last accessed on 21 September 2015).

559 It is from 2007 on that the authorities register figures on excluded asylum seekers who cannot be removed from the Netherlands due to *refoulement*. From 2007 till December 2013 on, this concerns a total of approximately 180 aliens.

560 According to data from DT&V, from 1 January 2009 until 1 March 2014 on, less than 10 excluded asylum seekers who could not be removed due to *refoulement* have demonstrably left the Netherlands. It should be noted that in case of numbers which are less than five, in official records 'less than ten' is reported by DT&V.

granting of such a permit'.[561] This particularly counts for those excluded asylum seekers in whose case *refoulement* plays a role: as the return to the home country is ruled out, finding a third country which will accept an alien to whom Article 1F is applied, is also very difficult.

§ 5.2.8 Investigation and prosecution

All Article 1F cases are automatically sent to the National Public Prosecutors' Office in order to assess whether a possible investigation and prosecution can take place. The assessment is done independently by the Public Prosecution Service, taking into consideration whether the Netherlands has jurisdiction on the matter and to what extent it is obliged to go over to prosecution.[562] When the Prosecutors' Office believes there are possibilities for a criminal investigation, the file is sent to the Team for International Crimes *(Team Internationale Misdrijven)* which was set up in July 2003. The fact that the Public Prosecutor does not want to or cannot prosecute has no influence on the exclusion which is an administrative decision.

Though over the years, Article 1F has been applied to hundreds of persons, only a few are actually prosecuted. This has mainly to do with the difficulties in collecting evidence: often the alleged committed crimes took place some time ago and the witnesses are abroad.[563] The State Secretary expressed that during the last ten years, fourteen persons have been prosecuted for involvement in international crimes. Out of these fourteen, 6 cases concerned Article 1F.[564] With regard to these 1F cases, four cases led to a conviction;[565] in one case the alien was cleared of the charge of torture and other crimes against humanity and in another case the suspected alien passed away before the judgment of the court could be made.
Besides prosecution and sentencing in the Netherlands, an excluded asylum

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[561] Advisory Committee on Migration Affairs, Where there's a will but no way *(Waar een wil is, maar geen weg)* The Hague, 1 July 2013.

[562] The International Crimes Act and the Rome Statute of the International Criminal Courts are relevant within this perspective.

[563] See Swart 2008, pp. 424-427; Van der Vlugt & Van Zadelhoff 2013; Van Wijk 2011 and Bolhuis & Van Wijk 2015.

[564] These data are based on the Report Letters International Crimes *(Rapportagebrief Internationale Misdrijven)* which are yearly published by the Ministry of Justice. The last report letter is dated 29 June 2015, No. 649212.

[565] These include two Afghans who are convicted for torture; one Rwandese who was charged with committing war crimes during the genocide in Rwanda in April 1994 and is sentenced to life imprisonment (Supreme Court 26 November 2013, App. No. 12/04592 (RvdW 2013/1442) and a Congolese citizen who was charged with committing torture in his home country and is sentenced to 2.5 years imprisonment (District Court Rotterdam 7 April 2004, App. No. 10/000050-03 Ars Aequi AA20040729 includes annotation from G.G.J. Knoops).

seeker who fulfills certain criteria can be extradited; handed over to an International Criminal Tribunal or to the ICC[566] or the other way round, suspects who are acquitted by a tribunal or the ICC who apply for asylum in the Netherlands may fall under Article 1F.[567]

§ 5.2.9 Family members

The general rule with regard to family members of an excluded asylum seeker is that in principle also family members (referring to spouse/partner/underage and of age children) do not receive a residence permit due to public order policy as laid down in Articles 3.77 and 3.107 of the Aliens Decree.[568] However, there are exceptions to the rule as family members can apply for asylum on individual grounds. When one or more members of the family obtain a residence permit based on their own record, this does not mean that the excluded asylum seeker will be considered for a permit on the basis of Article 29 (2) of the Aliens Act. In this situation, Article 1F will also be held against the alien. In the case of family members, Article 8 ECHR also needs to be considered. Later on in this chapter, I will discuss the role of Article 8 ECHR in Dutch case law regarding the exclusion clauses. At present, according to Dutch policy, the interests of public order in principle outweigh the interests of family life when it concerns Article 1F.[569]

In 2008, a new section regarding family members of 1F applicants was added to the Aliens Circular.[570] Thus, family members who have been staying in the Netherlands for a long, continuous period, will no longer be subject to the contraindication of Article 1F if they meet three conditions:

a) counting from the first asylum request, they should have been resident in the Netherlands for at least ten years;
b) the mentioned residence has to be a continuous one and
c) the process of expulsion should not have been frustrated by the person concerned.

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566 As the Rome Statute uses the complementarily principle as a basis, the primary responsibility for prosecution and trying the suspect rests with the states.

567 See also the case of the three Congolese who were summoned to come over to the ICC in order to testify against Germain Katanga and Mathieu Ngudjolo Chu who were suspected of committing war crimes and crimes against humanity in Congo, applied for asylum in the Netherlands and were objected Article 1F <http://verblijfblog.nl/2014/05/08/getuige-bij-het-strafhof-of-asielzoeker-in-nederland/> (last accessed on 21 September 2015).

568 See Bruin 2008, pp. 438-442.

569 See 'Note concerning the application of Article 1F of the Refugee Convention', 6 June 2008, p. 26.

570 C2/7.10.2.7.

In the previous paragraphs, the Dutch legislation on Article 1F has been expounded. The changes in the Aliens Circular concerning, *inter alia*, the durability and proportionality-test and family members have been included to resolve the problems attached to the situation of in particular the excluded Afghan men (who served the KhAD/WAD) and their families.
Though the application of Article 1F in the Netherlands does not solely concern these ex-KhAD/WAD members, (the State Secretary explained that to date Article 1F is held against more than fifty different nationalities of aliens) it is a fact that since the mid-1990s legislation and policy regarding 1F in the Netherlands has been designed in view of the Afghans. In the following paragraphs, the situation of this group, which is still a topic of debate in politics, will be discussed in which attention will also be paid to the prosecution of excluded asylum seekers. The core of the matter on the KhAD/WAD group lies in an official report which at request of the Minister of Justice, was drawn up by the Ministry of Foreign Affairs. The request was done to understand the nature and activities of the intelligence services and consequently define a policy on them.

§ 5.3 The excluded ex-KhAD/WAD members

§ 5.3.1 Official report on the KhAD/WAD

Similar to the Aliens Act, this official report was produced in 2000. The focus in the report is on the KhAD, which was set up in 1980 and transformed into a Ministry in 1986, the WAD, which remained operational until the fall of the communist regime in 1992. The central question to be answered in the report was if and if so, which former Afghan intelligence services members, particularly those from the KhAD and the WAD, had violated human rights.

According to the report, 'all non-commissioned officers and officers were active in the macabre divisions of the KhAD/WAD and were personally involved in the arrest, interrogation and sometimes execution of suspected persons'.[571] More specifically, the report states:

'As already mentioned, all non-commissioned officers and officers violated human rights. Non-commissioned officers and officers could not function within the KhAD and the WAD when they did not demonstrate in concrete their unconditional loyalty to the communist regime. […] The first placement of non-commissioned officers and officers was in divisions of the KhAD/WAD which were specifically engaged in tracking down 'elements that posed

[571] Report from the Ministry of Foreign Affairs, 'Intelligence services in communist Afghanistan (1978-1992), AGSA, KAM, KhAD and WAD', 29 February 2000, para. 2.7.

a threat to the State'. The rotation system ensured that operatives changed divisions frequently. A promotion or placement in a division or board with a more administrative or technical character was only attainable for those who had sufficiently proved their mettle during the first placement (s). In practice, this means that all non-commissioned officers and officers of the KhAD and the WAD took part in interrogating and torturing of opponents of the communist regime whether alleged or not'.[572]

The report also mentions that it is based on communications from the Dutch Embassy in Islamabad and that reports from the UN Special Reporter for Afghanistan, Amnesty International, Human Rights Watch and the literature on Afghanistan under communist regime had also been used.

As a result of the report of 2000, the burden of proof is reversed and the current rule regarding Article 1F is that all former non-commissioned officers and officers of the KhAD/WAD are assumed to have personally and knowingly participated, unless they can prove that a significant exception applies in their individual case.[573] Such an exception can be accepted when the following three cumulative conditions are met: 1) the alien joined the KhAD/WAD as a lateral-entry officer which makes it plausible that he did not complete the officers' training; 2) the alien did not rotate within the organisation and 3) the alien was not promoted during the term of service. In practice, the person to whom Article 1F is applied, is hard-pressed to meet the conditions as it rarely happens that an ex-KhAD member falls outside the scope of Article 1F due to his exceptional situation.[574]

In 2007, the Dutch government issued a general pardon for aliens who had claimed asylum before 1 April 2001 (under the old Aliens Act), but those to whom Article 1F was applied did not fall under the agreement. The same counts with regard to the children of 1F applicants who live illegally in the Netherlands; they fall outside the scope of the children's pardon for under-age asylum seekers and their families *(Kinderpardon)*, which took effect from February 2013 on.[575] For a group of Afghans who are currently in

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572 Idem, para. 2.9.

573 Besides the ex-KhAD/WAD members also certain members from the Hezb-i-Wahdat and non-commissioned officers and officers who served at certain departments of the Afghan police during the period 1978-1996 are assumed to have personal and knowing participation. This also counts for heads from the General Intelligence Service, Military Intelligence Service, Special Security Department and the Military Security Department from Iraq.

574 The State Secretary expressed in March 2013 that he had knowledge of 2 cases during the last 13 years in which the excluded Afghan managed to prove his innocence. See *Appendix to Proceedings*, 2012/13, No. 1774.

575 In September 2014 a joint motion is proposed by four opposition parties in the

the situation of not being removed, but neither have the right for a lawful stay, the official report of the Ministry of Foreign Affairs is the source of their predicament. Over the years, several organisations have criticised the Dutch official report including the UNHCR which in 2008 came with its own 'Note on the KhAD/WAD'. In the following, attention will be paid to the criticism expressed against the official report and the response from the Dutch government.

§ 5.3.2 Criticism[576]

§ 5.3.2.1 The UNHCR's 'Note on the KhAD/WAD'

It was a stirring year in 2008 regarding the issue of Article 1F: besides the publication of the ACVZ advisory report to the government[577] and a new policy paper by the State Secretary, it was in May 2008 that the UNHCR published its 'Note on the Structure and Operation of the KhAD/WAD in Afghanistan 1978-1992'. The purpose of the Note was to provide information within the context of assessing the eligibility for international protection for Afghan asylum seekers who were members of the KhAD/WAD. The Note was prepared by the UNHCR using information gathered through research over the years 2001-2008, including interviews with persons who were associated with the KhAD/WAD at the time and discussions with Dr Giustozzi, who is a leading expert on Afghanistan and the KhAD/WAD in particular.

Section V, titled 'Rotation and promotion within the KhAD/WAD', includes the following conclusions:

The Netherlands Ministry of Foreign Affairs report on the security services in Afghanistan during 1978-1992 states that "As a first assignment, NCOs and officers were posted to KhAD and WAD sections actively engaged in tracking down 'elements that posed a threat to the State'." Other sources affirm that this practice was limited to KhAD/WAD officers and NCOs of the Operational Directorates listed in paragraph 16 above, and that the term "tracking down", when translated from Dari, means surveillance, information collection and investigation. The tasks of KhAD/WAD officers and NCOs in practice included these aspects, in as far as preliminary

current House of Representatives (Socialist Party, ChristianUnion, Greenleft and Democrats 66) in order to change the position of children with a 1F-parent in relation to the children's pardon which is rejected. See *House of Representatives* 2013/14, *Proceedings II*, No. 105.

576 A considerable part of this paragraph is based on my paper in Bahtiyar 2010, pp. 23-30.

577 See Van Os-Van den Abeelen 2008, pp. 392-395.

investigations were concerned. However, beyond preliminary investigations, interrogations and further prosecutions were the responsibility of officers working at the Directorate of Interrogation and in provincial interrogation units, and the Attorney General's office.

The UNHCR is not able to confirm that there was a systematic rotation policy inside KhAD/WAD. Sources consulted by the UNHCR affirmed that rotations within the KhAD/WAD structures were largely based on expertise and experience. In emergency situations, staff may have been shifted to work on a given operation, but within its area of expertise. Military personnel operated within its rank and levels of expertise. One expert stated that, in his view, there was no mandatory rotation; he believes that people could change jobs within the KhAD/WAD, but that it was not a rule or requirement. In the view of that source, such a rotation policy would have gone against any sense of professionalism within the institution. Other sources state that the activities of KhAD/WAD officers were regulated by a number of principles, one of which was confidentiality. For this reason, they believe that the KhAD/WAD could not resort to a general rotation policy, as this would have risked disclosure of information from one Directorate to another.

The fact that the UNHCR's conclusions regarding the rotation system within the KhAD/WAD are at odds with those from the report of the Ministry of Foreign Affairs, made NGOs and other organisations in the Netherlands doubt the correctness of the Ministry's report and criticise its sources.[578]

§ 5.3.2.2 Other critical arguments

Organisations such as the Dutch Section of the International Jurists, the Refugee Council in the Netherlands and Amnesty International argue for the revision of the official report of 2000. Amnesty International asserts that it has extensively reported on human rights violations in Afghanistan during the period 1978-1992, but that it could not demonstrate the guilt of all officers and non-commissioned officers in the KhAD/WAD or the existence of a rotation system as described in the Ministry's report. Amnesty also commented on the fact that the Ministry's report is based on anonymous sources.[579] The sources used by the Ministry are also subject to other criticism: the public sources mentioned in the report do not contain

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[578] Also in two judgments of Dutch district courts, a reference was made to the UNHCR's Note and the correctness of the official report was considered to be doubtful. However, in appeal, these judgments are set aside by the highest administrative court which supports the official report. (District Court The Hague 18 February 2009, App. No. 07/39347 and District Court The Hague 25 February 2009, *AWB* 08/11368),

[579] Position paper on Article 1F of the Refugee Convention *(1F Standpunt Amnesty International 2008)*.

information supporting the conclusions of the report and the anonymous sources are not made public.[580] Another point of concern for many which is related to the report is the far-reaching reversal of burden of proof. The fact that the excluded alien has to prove to be an exception which is practically impossible makes one question whether it can be said that an individual examination is carried out.

The expressed critique against the report resulted in a motion being handed in by the Dutch Democrat party in which it requested the government to come up with a new, independent research regarding the report which for example could be carried out by the NIOD Institute for War, Holocaust and Genocide Studies.[581] The Afghan Parliament also became involved f in this issue and advised the Dutch government that the conclusions in its official report were unreliable and incorrect as the main sources classified as confidential originated from communications from the Dutch Embassy in Pakistan. According to the Afghan authorities these memoranda were based on false statements issued by the Pakistani military intelligence, the Inter-Services Intelligence (ISI), which had political reasons for doing so. Furthermore, 'the fact that the Dutch representatives could not enter Afghanistan at that time and consequently could not hear people on their own authority, gave Pakistan the chance to select and instruct the sources in such a way that made the Dutch Ministry of Foreign Affairs unambiguously declare the guilt of all non-commissioned officers and officers'.[582]

§ 5.3.2.3 Response from the Dutch authorities

The UNHCR's Note prompted the Ministry of Foreign Affairs to have consultations with the UNHCR Netherlands, Brussels and Kabul. In his letter to the House of Representatives of 2 October 2009, in which the Minister of Foreign Affairs gave an account of these meetings, he stated that the consultations in Kabul made clear that the UNHCR's interviews did not aim to discuss the rotation system. According to the Minister of the day, the UNHCR did not carry out a specific research on the rotation system regarding the relevant period up to the issuance of the official report on 29 February 2000, but that it simply had not come across it in its contacts with the KhAD/WAD.[583] Unlike the UNHCR, the Ministry did conduct a

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580 See Van Eik 2007.

581 The motion was rejected as the coalition parties (Social Democratic Labour Party and People's Party for Freedom and Democracy) including a few other opposition parties voted against it, *House of Representatives* 2013/14, *Proceedings II* 19637, No. 106.

582 Letters from Mr. Qanooni (former chair of the Afghan Parliament) to the Dutch House of Representatives dated 5 August 2007, 22 May 2008 and 17 February 2009.

583 *House of Representatives* 2009/10, *Proceedings II* 27925 and 19637, No. 363.

specific research into the rotation system in that period, said the Minister.[584] The Dutch authorities consider the sources consulted after the publication of the official report to be unreliable or less reliable; due to the fact that the Dutch 1F policy is widely known, new sources which are to be consulted must be assumed to have a reason for and/or interest in presenting a certain impression of things, which entails the risk of using politically or otherwise motivated statements.[585] The concluding statement of the Minister in his letter is that neither the UNHCR, nor the Ministry has been able to find reliable additional information regarding the rotation system which raises the question whether it is still possible to obtain such information. The authorities believe this is not the case and therefore stick to the correctness of the official report of 2000.[586]

§ 5.3.2.4 Current affairs regarding the Afghans

The problems entailed in the policy of the ex-KhAD/WAD members stir up the interest of many in the matter. Besides political parties, the Dutch Section of the International Jurists, the Refugee Council in the Netherlands, Amnesty International and the Afghan Parliament which I already mentioned, also the Union of Afghan Associations in the Netherlands *(Unie van Afghaanse Verenigingen in Nederland)*[587] and several lawyers who assist 1F applicants are critical regarding the official report. Furthermore, several solidarity groups which devote themselves to the cause of the Afghans have been founded and are active such as the 'Foundation 1F' *(Stichting 1F)* and 'Sign for Justice' *(Teken voor Rechtvaardigheid)*.[588] Another group, which is supported by Defence for Children and Justitia et Pax is the 'Committee, there is no such thing as a wrong child' *(Comité Foute Kinderen Bestaan Niet)*. This Committee calls for attention for the situation of children without a permit due to the fact that Article 1F is held against their fathers.[589]

An interesting development to mention is the case of the former mayor of the Giessenlanden municipality (Mrs Els Boot) who ordered the police not to

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584 *House of Representatives* 2009/10, *Proceedings II* 27925, No. 377.

585 Ibidem.

586 The current State Secretary of Justice holds the same opinion regarding the report.

587 Contrary to the Union of Afghan Associations in the Netherlands, the Federation of Afghan Refugee Organisations in the Netherlands *(Federatie van Afghaanse Vluchtelingen Organisaties in Nederland - FAVON)* and Afghanistan Watch remain distant from the group of ex-KhAD/WAD members to whom article 1F is applied. The latter two organisations focus on the position of the victims under the former communist regime in Afghanistan and want to the Dutch authorities to be more active in the criminal prosecution of these men.

588 <http://www.tekenvoorrechtvaardigheidinnederland.nl/publicaties.html> (last accessed on 21 September 2015).

589 See Van Os & Goeman 2008, pp. 443-448.

cooperate in the removal of an Afghan national to whom Article 1F applied. This led to the situation in which she and the Minister for Immigration, Integration and Asylum at the time had very different views on the matter. The person in question, Mr Naibzay, was excluded from asylum as being an ex-KhAD/WAD member and he had already been living in the Netherlands for over 13 years. His spouse and four children had received a residence permit and, according to the mayor, his removal would lead to social unrest in the community. In an open letter to the Minister, the mayor asked for attention to be given to the situation of Mr Naibzay and criticised the fact that he had to prove his innocence, which is practically impossible given that evidence is not accepted.[590] The mayor sent a second letter to the Minister, which was signed by ten other mayors. This time, they requested attention for the 1F situation applying to Afghans in general. The mayors discussed the reversed burden of proof and the individual examination attached to this. They requested the Minister to consider the policy regarding the official report on the KhAD/WAD and to suspend removal proceedings of Afghan men to whom Article 1F is applicable.[591] More municipalities expressed their support for the 1F applicants and a meeting between the mayors and the Minister took place. In the end, the action did not lead to much as it was concluded that in the case of a removal, the police fall under the exclusive authority of the Minister: a mayor cannot frustrate the action by appealing to the disturbance of the public order.[592]

Mr Naibzay, who was the focus of interest in the dispute between the mayor and the Minister has now left the Netherlands. After an unlawful stay of fifteen years and no perspective for any change regarding his situation in the Netherlands, he received in August 2011 a residence permit to stay in Belgium. The fact that Mr Naibzay was never prosecuted for the acts which made him fall under 1F and Belgium does not confirm the KhAD/WAD policy of the Netherlands made it possible for him to receive a lawful stay in Belgium which is based
on the right of citizens of the Union and their family members to move and reside freely within the territory of the EU and EEA Member States as he is living there with his family members who are EU citizens.
This case is a good example showing the struggle between the government policy and the municipalities which eventually carry the burden of it. According to an administrative agreement between the government and the Association of Netherlands Municipalities, municipalities are forbidden to

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590 The mayor's letter is dated 23 May 2011.

591 The letter is dated 27 June 2011, <http://inlia.nl/uploads/File/1F%20Brief%2016%20burgemeesters%20aan%20minister%20Leers%2027juni2011.pdf> (last accessed on 21 September 2015).

592 *House of Representatives* 2012/13, *Proceedings II* 19637, No. 1588.

provide care to those aliens who have an unlawful stay in the Netherlands.[593] This also counts for excluded asylum seekers, as they do not have a residence permit and are obligated to leave the country, even when *refoulement* is at stake. The reality is that the majority of these aliens do not leave the Netherlands and have to live somewhere. Those who have members of their family members in the host country can rely on them but others who do not, are dependent on emergency accommodation provided by charity institutions or the municipalities which are thus actually not allowed by the government to provide this. See also § 5.2.7 on the European Committee of Social Rights' decisions ruled against the Netherlands in which the Committee considered that the legislation and practice of the Netherlands fails to ensure access to community shelter for the purpose of preventing homelessness. The practical and legal measures denying the right to emergency assistance restrict the right of adult migrants in an irregular situation and without adequate resources in the Netherlands in a disproportionate manner, which according to the Committee, leads to the violation of the European Social Charter.

Another case that is also worthwhile to state is the case of Feda Amiri who, after a stay of eighteen years in the Netherlands, was removed to Afghanistan on 5 January 2015. Similar to the Naibzay case, Amiri was an ex-KhAD/WAD member, who accompanied by his family, applied for asylum in 1996. Initially, all family members (including the father) received a residence permit. When they requested naturalisation in 2004, father Amiri was rejected under Article 1F of the Refugee Convention which is based on the 2000 official report, and led to the withdrawal of his permit. Amiri was never prosecuted for the acts which were enforced against him and as his new asylum request before removal was of no avail, he is actually removed and thus separated from his spouse and children who live in the Netherlands.[594] According to Amiri's lawyer, his case is still pending at the ECtHR as he maintained his right to respect to his family life.

Despite the efforts by many as explained under the foregoing paragraphs, the current situation regarding the ex-KhAD/WAD members remains unchanged. The official report is maintained and is supported by the highest administrative court in the Netherlands.[595] The State Secretary will continue

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[593] Administrative agreement between the State Secretary for Justice and the Association of Netherlands Municipalities regarding the policy on migration. *(Bestuursakkoord tussen de Staatssecretaris van Justitie en de Vereniging van Nederlandse Gemeenten inzake het vreemdelingenbeleid)* The Hague, 25 May 2007.

[594] 'Is Amiri ten onrechte uitgezet'?, De Volkskrant (daily Dutch newspaper) 7 January 2015.

[595] Administrative Jurisdiction Division of the Council of State 30 November 2004, App. No. 2004040081/1; 24 September 2009, App. No. 200901907/1/V1 (JV

with the same policy as his predecessors and stand by his opinion that an individual examination is carried out.[596]
Over the years, much jurisprudence has been developed on Article 1F of which quite a lot concerns ex-KhAD/WAD members. Besides the initial appeals against the application decisions, several topics relating to Article 1F were discussed in proceedings. To give an idea of the administrative court's rulings on 1F, the following paragraph will provide an overview of some relevant judgments.

§ 5.4 Case law on 1F

With the entry into force of the Aliens Act 2000, the Administrative Jurisdiction Division of the Council of State became the highest court for asylum cases. Therefore, appeals against decisions of the IND can be made to the district courts with a further appeal to the highest court. Since the new Aliens Act, the way of reviewing asylum cases has changed as courts carry out the 'test of reasonableness' *(Marginale toetsing)* instead of a full review. With this test, which is a limited judicial review, it is examined whether administrative powers have been exercised reasonably. Thus, the Court does not judge on the substance of the appealed decision (whether it is a correct decision), but focusses on the procedural standards the administrative authorities had to observe; the latter keeps its discretionary powers.[597] Thus, administrative courts can only annul a decision and are not able to decide differently on a case.[598] As a result of a recent research called the 'Dutch judge in migration law', Professor Spijkerboer from the Free University in Amsterdam criticised the highest administrative court. He investigated 638 judgments from the years 2010 and 2011 and states that the highest court mainly chooses the side of the government and rarely the side of the migrant. Further it puts forward that the highest court does not take up a position as the guardian of fundamental rights when it concerns migration law.[599]

2009/416); 29 October 2009, App. No. 200902119/1/v1 and 2 October 2012, App. No. 201100646/1/V1.

596 See *House of Representatives* 2012/13, *Proceedings II* 19637, Nos. 1703 and 105.

597 Barkhuysen, Ouden & Schuurmans 2012.

598 <http://verblijfblog.nl/2013/09/30/inhoudelijke-toetsing-in-asielzaken-3/> (last accessed on 21 September 2015).

599 Spijkerboer 2014. This is not the first time that Spijkerboer criticises the highest administrative court as he also did in 2002 during his inaugural lecture ('Het hoger beroep in vreemdelingenzaken'). Spijkerboer does not stand alone in his criticism. In 2008, Groenendijk & Terlouw published a book: 'Tussen onafhankelijkheid en hiërarchie. De relatie tussen vreemdelingenrechters en de Raad van State, 2001-2007', in which they reported on expressed criticism by lower court judges trying aliens cases on the Administrative Jurisdiction Division of the Council of State.

It is laid down in Article 4:6 of the General Administrative Law Act *(Algemene Wet Bestuursrecht)* that when an asylum claim is rejected, a request for a revision of the decision is only possible when newly emerged facts or altered circumstances have been adduced. When this is not the case, the administrative body may reject the new request with reference to the decision on the original request.[600]

Official reports and burden of proof
There are two kinds of official reports issued by the Dutch Ministry of Foreign Affairs: individual and general ones. Such a report is an independent expert report which has to be set up in accordance with the Ministry of Foreign Affairs' operational instructions and gives a description of the situation in a particular country as far as this is relevant to the assessment of asylum requests from aliens originating from that country and to decisions on the return of rejected asylum seekers. The report is used by the IND to decide on asylum requests and the Ministry of Justice to develop an immigration policy. Based on settled case law of the Administrative Jurisdiction Division of the Council of State, it is apparent that the Ministry of Justice may rely on the correctness of a general country report when the report gives insight into impartial and objective information and states as far as possible its sources, unless there are concrete leads which cast doubt on its correctness and completeness.[601] The same counts for individual reports.[602]

As shown above, the official report on the ex-KhAD/WAD members has been a matter of dispute for many. On a few occasions, the district courts judged to doubt the correctness of the report by referring to the UNHCR's Note on the KhAD/WAD. On appeal in the court of last resort, these judgments are set aside.[603] Interrelated to an official report is the question whether applying Article 1F to the alien was correct, thus whether there was 'knowing and participation'. The majority of the cases brought to court concern this issue

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600 There is an exception to what is prescribed in Article 4:6: in the case of a repeat asylum application which also invokes the risk of treatment contrary to Article 3 ECHR, an assessment by the Court outside the scope of Article 4:6 is possible.

601 Administrative Jurisdiction Division of the Council of State 12 October 2001, App. No. 200103977/1 (AB 2001, 359 includes annotation from I. Sewandono) and 23 December 2003, App. No. 200305568/1 (JV 2004/78).

602 Administrative Jurisdiction Division of the Council of State 11 October 2002, App. No. 200204522/1 (Ars Aequi RV20020012 includes annotation from R.J.A. Bruin).

603 District Court The Hague 18 February 2009, App. No. 07/39347 (Administrative Jurisdiction Division 24 September 2009, App. No. 200901907/1/V1 – JV 2009/416), District Court The Hague 25 February 2009, *AWB* 08/11368 (Administrative Jurisdiction Division 29 October 2009, App. No. 200902119/1/V1) and District Court The Hague 27 May 2011, App. No. 10/17614 (Administrative Jurisdiction Division, 13 April 2012, App. No. 201106991/1/V1 – JV 2012/251 and JV 2012/279).

and in general, the burden of proof lies with the authorities.[604] In the case of the ex-KhAD/WAD members, 'knowing and participation' is assumed to exist and up to the alien to prove the contrary. An interesting judgment on the reversed burden of proof came from the District Court The Hague in which for the first time reference was made to the ECJ's ruling in the *B and D* case of 9 November 2011.[605] The case concerned an appeal of an ex-KhAD/WAD member whose permanent residence permit was withdrawn by the authorities because he withheld information which would, in the first place, have led to the rejection of his asylum application. The court stated that 'as Article 1F of the Refugee Convention is equivalent to Article 12 (2) of the Qualification Directive, it sees cause to take the European Court of Justice's interpretation regarding Article 12 (2) into consideration in this case. According to the district court, the official report on the KhAD/WAD, to which the Minister referred to in this case, is correct. However, in view of the reasons adduced for the judgment of the Court of Justice as mentioned above, the mere reference to the report, with the option for the claimant to provide proof to contrary, is not satisfactory: 'the Minister had to conduct an individual investigation on the specific facts in claimant's case and assess the individual responsibility in the light of both objective and subjective criteria. Though the Minister proceeds on the fact that individual circumstances can play a role in the application of Article 1F, putting the burden of proof on the claimant is according to the district court no longer sustainable'. This judgment of the district court is set aside by the highest court as it stated that at the time the decision was taken, the implementation term of the Qualification Directive was not expired and consequently the Directive was not yet implemented in national law as a result of which the review for compliance with Article 12 (2) was unlawful.[606] In a later judgment, the district court quashed another IND decision concerning an ex-KhAD/WAD member by putting forward this line of reasoning.[607] On appeal, the highest court found the district court's position concerning the reversed burden of proof to be erroneous and expressed that given the violent character

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[604] See, *inter alia*, District Court The Hague 10 January 2006, *AWB* 03/40505; 1 March 2006, *AWB* 04/35017; 17 January 2006, *AWB* 04/50120 (JV 2006/118); 10 June 2002, *AWB* 02/5525 BEPTDN H; 4 June 2009, *AWB* 08/28564 and Administrative Jurisdiction Division 23 July 2004, App. Nos. 200402639/1 and 200402651/1; 1 June 2011, App. No. 201005191/1/V1.

[605] District Court The Hague 22 February 2011, *AWB* 06/24277 (Ars Aequi RV20110095 includes annotation from G.-R. de de).

[606] Administrative Jurisdiction Division of the Council of State 13 April 2012, App. No. 201102789/1/v1 (AB 2012/208).

[607] District Court The Hague 4 May 2011, *AWB* 09/29907. See also the judgment of 10 October 2011, App. No. 11/6096 which was not a KhAD/WAD case, but in which the district court put forward that seen in the light of the *B and D* case, the burden of proof should be on the authorities and not on the alien.

of the KhAD/WAD, assuming personal and knowing participation with regard to persons who had held a certain position within the organisation, is compatible with Article 12 (2) of the Qualification Directive. The court's reasoning is found upon § 98 of the *B and D* case in which is laid down that:

'Any authority which finds, in the course of that assessment, that the person concerned has – like D – occupied a prominent position within an organisation which uses terrorist methods is entitled to presume that that person has individual responsibility for acts committed by that organisation during the relevant period, but it nevertheless remains necessary to examine all the relevant circumstances before a decision excluding that person from refugee status pursuant to Article 12 (2) (b) or (c) of Directive 2004/83 can be adopted'.[608]

Durability and proportionality-test

To minimize the group of aliens living in limbo (no admission, no removal), the Administrative Jurisdiction Division introduced the durability and proportionality-test. This test was adopted in policy and accordingly, the asylum decision must show that the authorities have assessed whether the alien has argued convincingly that Article 3 ECHR is a sustainable obstacle for removal to the country of origin, if so, whether his exceptional situation makes it disproportionate to withhold a residence permit. Thus, while it is up to the alien to prove there is a real risk of ill-treatment upon return, the authorities have the task to carry out an Article 3 examination when deciding on the asylum request.[609] The highest court confirmed the current policy in its case law by stating that the term sustainable obstacle means a residence of ten years, starting at the date of the first asylum application,[610] and that the questions whether Article 3 ECHR is a sustainable obstacle for expulsion and withholding a permit is disproportionate, should be assessed separately. The latter question only comes up for discussion after the finding

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608 Administrative Jurisdiction Division of the Council of State 29 February 2012, App. No. 201106216/1/v1 (JV 2012/178).

609 The judgment of 30 January 2012 of the Administrative Jurisdiction Division of the Council of State App. No. 201008097/1/V2 (JV 2012/124) concerned the case of an Afghan who was granted asylum in 1996. In 2007, the authorities withdraw his status and imposed an exclusion order on him due to the application of Article 1F. Contrary to what the district court decided on appeal, the highest administrative court stated that when it concerns the withdrawal of a refugee status, it is not to the alien to show that he fears for his life upon return to the country of origin, but the authorities to make plausible that different from the time of the initial decision, currently there is not a *refoulement* obstacle.

610 Administrative Jurisdiction Division of the Council of State, 17 May 2011, App. No. 201012016/1/V1.

that there is a sustainable obstacle for removal.[611] The Circular does not say much about the disproportionate requirement, as it only states that 'disproportionality is accepted when the alien proves to be in an exceptional situation'. The fact that up till now only a few cases have been decided in favour of the alien shows that the criterion of special circumstances is hard to please. An alien will for example not manage to succeed to show he is in an exceptional situation when he puts forward he has a family life in the Netherlands. According to the highest court, this situation does not make withholding a permit to be disproportionate.[612] When the IND concludes that the alien satisfies the durability criterion, but withholding a permit not to be disproportionate, this is considered to be a return decision pursuant to Article 45 (1) of the Aliens Act 2000 and automatically implies the obligation to leave the country. In a case dated 26 June 2013, the alien expressed this situation to be against Article 6 (4) of the Returns Directive in which is laid down that 'Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third country national staying illegally on their territory. In that event no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay'. The highest administrative court ruled that the Returns Directive does not oblige the authorities to issue a permit in case the alien fulfils the durability criterion and nor does it forbid the issuance of a return decision in such a case.[613]

Exclusion order

Until the implementation of the Returns Directive in December 2011, the application of Article 1F on an alien was a ground for the imposition of an exclusion order on the person which has now been replaced by an entry ban. There are still a great number of excluded asylum seekers to whom an exclusion order was imposed and that remains in force which makes it worthwhile giving attention to the case law regarding this topic. The imposition of the order on a 1F applicant is done in the interest of international relations as the crimes for which the person is held responsible are also considered to be serious crimes in the Netherlands. The fact that the alien has not been in trouble with the police or the law in the Netherlands or country of origin for many years as was put forward by the alien, was according to the district

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611 Administrative Jurisdiction Division of the Council of State 10 August 2011, App. No. 201012044/1/v1 and 15 July 2011, App. No. 201005572/1/v2.

612 Administrative Jurisdiction Division of the Council of State 7 May 2012, App. No. 201105182/1/v1.

613 Administrative Jurisdiction Division of the Council of State 25 June 2013, App. No. 201208588/1/v1 (JV 2013/306).

court no argument for the authorities to take into account when deciding about the order[614] and the fact that the alien has not been prosecuted for the crimes is unrelated to the imposition.[615]

The Administrative Jurisdiction Division of the Council of State judged that imposing an exclusion order on an alien who is excluded from asylum, but cannot be removed from the country due to Article 3 ECHR is not disproportional as the interest of international relations is not less important because of Article 3. Furthermore, the question how the consequences of an exclusion order concerning criminal law relate to the fact that the alien cannot be removed to the country of origin is to be answered by the Public Prosecutor and criminal court. The question whether it is proportionate, is to be assessed as part of the decision on imposing an exclusion order on the alien concerned as it is not the duty of the criminal court to pass a judgment on the matter whether Article 3 ECHR forms an obstacle for removal, in which no overriding importance is given to the consequences concerning criminal law.[616] With this ruling, the highest administrative court set aside the judgment of the district court which had ruled in favour of the alien. According to the latter court 'imposing an exclusion order to exert pressure upon the alien to leave the Netherlands did not play a role, as it was not disputed he could not leave, while on the other hand, such an order provides that the alien is continuously exposed to prosecution which results in it being disproportional'.[617] An alien to whom an exclusion order is imposed and who is criminally prosecuted on the basis of Article 197 of the Criminal Code may invoke circumstances beyond one's control for the fact he is still illegally residing in the country. According to case law, the alien cannot be blamed when he has tried to make an end to his illegal stay by cooperating fully with the authorities in order to get travel documents.[618] In case such an alien relies on force majeure due to Article 3 ECHR, he has to show that serious attempts are undertaken to leave to a third country.[619]

When the alien makes a reference to Article 3 ECHR for lifting an exclusion order, it is examined whether *refoulement* is a sustainable obstacle. If so, the alien must also in this case show that he has undertaken serious attempts

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614 District Court The Hague 25 January 2013, *AWB* 12/12555.
615 District Court The Hague 10 January 2008, *AWB* 07/30085.
616 Administrative Jurisdiction Division of the Council of State 13 May 2009, App. No. 200808081/1/v1 (JV 2009/268).
617 District Court The Hague 6 October 2008, *AWB* 08/4229 08/4230 06/38209 (JV 2008/464).
618 The Supreme Court of the Netherlands 20 January 2009, App. No. 07/11353 (RvdW 2009, 221).
619 The Supreme Court of the Netherlands 1 December 2009, App. No. 07/12112 (RvdW 2009, 1434).

to leave to another country than his country of origin and that no other country allows him admission for entrance. If the alien fails to do this, the Administrative Jurisdiction Division finds the maintenance of the exclusion order to be correct.[620]

Article 8 ECHR

The right to family life is often invoked by the excluded asylum seeker to regularise his stay in the Netherlands.[621] In case of expulsion, the provision is appealed to when the spouse and children did receive a permit and removal of the alien would lead to separation of the family or other way around when the alien cannot be removed due to *refoulement* and his family members face expulsion. The policy is that there is in principle no right to stay for a 1F applicanton the basis of Article 8 ECHR and the same line is to be observed in the jurisprudence as the Administrative Jurisdiction Division ruled that relying upon Article 8 ECHR does not mean admission to the Netherlands should be granted to an alien against whom Article 1F is held.[622] When a 1F applicantinvokes Article 8, it is easy for the alien to show 'family life' and that there is an 'interference with the exercise of this right', but the difficulty lies in the situation where the state's interests are weighed against the alien's. To date, there has not been a case of a 1F applicant concerning Article 8 in which the alien's rights have prevailed over the state's interests. .[623] The highest administrative court considers that a person against whom Article 1F has been held by the international community is regarded as a danger to (international) public order and public safety and found that the State Secretary, when considering that the aim of the exclusion order is to prevent that an alien against whom Article 1F has been held can obtain protection in the Netherlands – thereby rendering the Netherlands as a host state for persons who have committed serious crimes – and to counter residence of that alien in the entire Schengen territory, has on good grounds and with sufficient reasoning adopted the position that interference in the alien's family life is justified in the interest of public safety and security.[624] An appeal to a breach of Article 8 ECHR of an excluded asylum seeker, who put

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620 Administrative Jurisdiction Division of the Council of State 16 June 2009, App. No. 200806/85/1/v1 (JV 2009/345).

621 Article 8 ECHR has also been invoked regarding reception facilities in relation to illegal aliens in which the question was raised whether the right to private life on the basis of Article 8 ECHR can under circumstances impose obligations on a state to provide accommodation and living allowance in order to safeguard that right. See § 5.2.7.

622 Administrative Jurisdiction Division of the Council of State 12 November 2007, App. No. 200703870/1 (JV 2008/16).

623 Administrative Jurisdiction Division of the Council of State 13 April 2012, App. No. 201106991/1/V1 (JV 2012/251 and JV 2012/279) and District Court The Hague 3 October 2002, *AWB* 01/19014 OVERIO A5.

624 Administrative Jurisdiction Division of the Council of State 31 October 2008, App. No. 200801101/1 (JV 2009/8).

forward that the interest of international relations on the basis of which an exclusion order was imposed on him did not fall under one of the interests of paragraph 2 which justify an interference into the right to family life, did not succeed.[625] According to the authorities, the interest of international relations is connected to the public order in the broad sense.

Though an Article 8 ECHR procedure is a regular one, when the authorities assess if withholding a residence permit is disproportionate, the arguments put forward by the excluded asylum seeker to show his situation to be exceptional may also concern the right to family life and must be take into consideration.[626] The situation of an excluded asylum seeker, whose family was legally residing in the Netherlands and he himself could not be removed due to Article 3 ECHR, was advanced as an argument by the district court, not to establish an infringement of the right to family.[627]

It has already been mentioned that the policy concerning family members of an excluded asylum seeker is that, in principle, they do not receive a permit either. Again, the general interests of the state prevails and the family members can only be granted a permit when their asylum application on individual grounds is accepted.[628]

§ 5.5 Conclusion

The arrival of a group of Afghan men who served the KhAD/WAD during the communist regime in Afghanistan brought attention to the application of Article 1F of the Refugee Convention at the end of the 1990s and led to the development of policy concerning that provision. The official report on the KhAD/WAD on the basis of which the burden of proof regarding this group is reversed, led to the exclusion of many who could not be prosecuted and returned and caused commotion regarding their position. The Netherlands is the only country within the EU which follows the rule that all former non-commissioned and commissioned officers are assumed to have personally and knowingly participated in the violation of human rights, unless they can prove their case to be a significant exception. The fact that it hardly ever happens that due to his exceptional situation, a person falls outside the scope of Article 1F, lead to many question whether it can be said that an individual

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625 Administrative Jurisdiction Division of the Council of State 22 September 2010, App. No. 201002668/1/V3.

626 Administrative Jurisdiction Division of the Council of State 15 July 2011, App. No. 201005039/1/v2; 5 December 2011, App. No. 201008053/1/v2 and 12 November 2007, App. No. 200703870/1 (JV 2008/16).

627 District Court The Hague 16 November 2010, *Awb* 10/14892.

628 District Court The Hague 1 August 2000, *AWB* 00/6095 (JV 2000/271 includes annotation from B.P. Vermeulen) and 4 July 2003, *AWB* 01/55596, 01/62136.

examination is carried out. A study of the UNHCR on the KhAD/WAD which contained a different conclusion than the Ministry's report, made several organisations doubt the correctness of the official report and criticise its sources. Though the UNHCR's finding's led to a new debate, it did not result in any change regarding the official report or policy. The authorities still stick to the correctness of the report and are supported in this by the highest administrative court.

The exclusion of an asylum seeker means that he is ineligible for refugee protection and at the same time no residence permit for asylum based on another ground will be issued. As such a person will also not be considered for a regular residence permit, the path for claiming a right to stay in the Netherlands is actually closed. Family members of excluded asylum seekers can apply for asylum on individual grounds. A rejection means the removal of a person, but this is not possible in cases of *refoulement*. However, the fact that an alien cannot be returned due to fear for his life does not entail a right to stay and he still remains under the obligation to leave the country at his own will. If the excluded alien passes the durability and proportionality-test, this can lead to the issuance of a permit. It is not a problem to show that Article 3 ECHR offers a sustainable obstacle, which means that the alien has been living in the Netherlands for ten years due to a *refoulement* issue, but claims often fail to meet the conditions of proving to have taken serious attempts to leave the country and show that they are exceptional. The problems in the post-exclusion phase have far-reaching consequences as aliens who do not have lawful residence in the Netherlands are not entitled to any social security benefits and facilities such as staying in a reception center.

By accepting an Article 3 ECHR obstacle and not removing a person to his country of origin, the authorities comply with their obligation under international law and provide protection to the person. On the other hand, expecting a person to leave the country at its own will, which is practically impossible and furthermore, withholding a permit after ten years of residence if he has not shown sufficient efforts to leave and on top of it all, making his residence punishable, raises the question whether the argument of not wanting to be a safe haven for war criminals is at odds with the infinite situation of many aliens. Considering the fact that a criminal conviction comes to an end after serving the punishment, it seems this cannot be said for the position of 1F applicants in the Netherlands who are excluded on the basis of 'serious reasons for considering', which is a lower standard of proof than 'beyond reasonable doubt' as used in criminal law.

Chapter 6 Application of Article 1F: current policies and their development in the UK

§ 6.1 Introduction

The UK has long been recognized as being an immigration country; however, it was the entry into force of the Aliens Act of 1905 which for the first time introduced a system of controlled immigration. Though the Act did not explicitly state the term 'refugee', it did include a provision on aliens who were seeking admission to avoid persecution on religious and political grounds. Though over the years legislative developments occurred in the field of immigration, including the adherence to the Refugee Convention after the Second World War,[629] it was not until 1993 that the UK introduced with detailed legislation on asylum. With the passing of the Asylum and Immigration Appeals Act,[630] the UK made reference to the Refugee Convention in statute law. Until that time, the provisions of the Convention were factors to be taken into account, but not directly enforceable as they had not yet been incorporated into domestic law. According to British constitutional law, a treaty must be incorporated into domestic law by an act of parliament, before persons can rely on it directly in national courts. The high increase of asylum applications in the 1980s and in the early 1990s was an important reason for the government to introduce measures for 'a better system for making prompt and fair decisions'.[631] It did not take much time before several Acts followed which focused on several aspects relating to the asylum proceedings.

From 2002 onwards Article 1F of the Refugee Convention became the centre of interest in the UK. The attacks on the Twin Towers in the USA led to the White Paper 'Secure Borders, Safe Haven' in which the government announced that the UK should not provide a safe haven for war criminals or those who commit crimes against humanity.[632] In the same year, the Asylum and Immigration Tribunal (AIT) gave a relevant judgment in the *Gurung* case,

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629 The UK is party to the Refugee Convention as well as the Refugee Protocol, which it respectively ratified on 11 March 1954 and acceded on 4 September 1968.

630 <http://www.legislation.gov.uk/ukpga/1993/23/contents> (last accessed on 21 September 2015).

631 In the eighties, the UK received a high number of asylum applications from Tamils from Sri Lanka and faced an inflow of asylum seekers from the Former Yugoslavia in the 1990s.

632 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/250926/cm5387.pdf> (last accessed on 21 September 2015).

which serves as precedent for further case law on the exclusion clauses.[633] In 2005, the UK government announced a five-year strategy plan for asylum and immigration in which it introduced tougher rules to deny asylum to those who have committed serious crimes, on top of excluding terrorists as one of the steps to be taken to tighten the asylum system to counter abuse.[634] This chapter contains an extensive discussion on the application of Article 1F in the UK with a focus on the post-exclusion phase. First, an outline of the legal framework will be given after which I will go into the asylum procedure, in particular what happens when exclusion questions rise. The second point to be dealt with, will be the current practice regarding those who are excluded but cannot be removed from the UK due to *refoulement*. In this connection, the introduction of the Criminal Justice and Immigration Act is interesting, which will also be reviewed. Further, attention will be paid to the application of Article 8 ECHR in relation to cases where 1F applicants have family members in the UK or file a claim on private life. Finally, I will deal with relevant case law and conclusions. To have a good understanding of what is meant by exclusion in this chapter, it is important to note that the use of the term 'exclusion' in the UK contains besides Article 1F also non-asylum cases, in which a person is banned from entering the UK because the Secretary of State deems it to be in the public interest.[635] As the focus of this study is on Article 1F, exclusion relating to the ban will not be examined further. Thus, when the term exclusion is used, it refers to Article 1F of the Refugee Convention.

§ 6.2 Legal framework

When considering the legal framework of the exclusion clauses in the UK, it is important to denote the difference between the civil law system of the Netherlands on the one hand, and the common law system of the UK on the other. The legal framework in the UK comprises common law and statute law. Legislation with regard to immigration includes a wide range of legal instruments. Though it can be said that the Immigration Act 1971 (IA 1971) forms the foundation for the current legal framework on immigration, this Act made no special reference to refugees. Acts on asylum in particular, date from 1993 onwards. As stated above, the Asylum and Immigration Appeals Act 1993 provided for the incorporation of the Refugee Convention in domestic law and made it directly enforceable. It ensured the primacy of

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633 *Gurung v. State Secretary for the Home Department*, [2002] UKIAT 4870, 14 October 2002.

634 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251091/6472.pdf> (last accessed on 21 September 2015).

635 See 'Exclusion or deportation from the UK on non-conducive grounds: consultation document Home Office' <http://media.apn.co.nz/webcontent/document/pdf/ACFAIAt9aaKU.pdf> (last accessed on 21 September 2015).

the Refugee Convention over conflicting national immigration rules and provided a definition of a claim for asylum.[636] Furthermore, the Act ensured an in-country right of appeal to be granted to asylum seekers with an exception in situations where national security was a ground for refusal.[637] Several acts relating to asylum and some containing relevant provisions within the context of the exclusion clauses have been passed since the latter Act including, *inter alia*, the Asylum and Immigration Act 1996 and accompanying Appeals Rules, Immigration and Asylum Act 1999 (IAA 1999) and Nationality, Immigration and Asylum Act 2002 (NIAA 2002), Asylum and Immigration (Treatment of Claimants etc.) Act 2004 and Immigration, Asylum and Nationality Act (IAN 2006). The Acts passed in the 1990s were a response to the high number of asylum applications and attempts to restrict the ability for asylum seekers to apply for asylum in the country and thus reduce the numbers. From the millennium on, the Acts show an additional focus as there is a special interest in national security and criminals. Thus, section 72 of the NIAA 2002 is named 'Serious Criminal' and prescribes that a refugee or asylum seeker sentenced to two years imprisonment or convicted of a specified offence loses protection under Article 33 of the Refugee Convention. Section 54 of the IAN 2006, among others, enlarges the scope of Article 1F (c) by including 'acts of committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence)' and acts of 'encouraging or inducing others' to do the same.[638]

Another piece of relevant legislation is the Human Rights Act 1998. This Act has been in force since October 2000 and brings the domestic law into line with the rights set out in the ECHR. Accordingly, all public authorities are required to act in accordance with the rights as enshrined in the Human Rights Act 1998 and its statutes. Though its provisions do not deal with asylum seekers in particular, excluded asylum seekers often refer to the prohibition of torture or respect for their family life which can prevent a removal.[639] The first judgment of the ECtHR on the applicability of Article 3 on removal was ruled against the UK, after which other relevant judgments followed.[640] Taking into account the Strasbourg case law, it is set out in the policy guidance concerning human rights claims that Article 3 ECHR is an absolute right and the UK's obligations under Article 3 apply irrespective of any reprehensible/criminal conduct on the part of the applicant.[641] As before

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636 Respectively sections 2 and 1.
637 Stevens 2004, pp. 165-167.
638 For more details regarding the Acts mentioned above see Stevens 2004, pp. 164-218.
639 See Chapter 4 for an outline on the ECHR in relation to the exclusion clauses.
640 See among others the *Soering; Vilvarajah and Chacal* cases.
641 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257425/consideringhrclaims.pdf> (last accessed on 21 September 2015).

the entry into force of the Act, violations of ECHR rights could only be addressed in Strasbourg, aliens who believe their rights have been violated under the ECHR now also have recourse to the UK courts. With respect to violations of *refoulement*, the UK jurisprudence has addressed issues such as detention conditions or poor medical or living conditions in the country of return. The issue of reliance on diplomatic assurances should be used with caution, especially with respect to countries where a detailed Memory of Understanding between the UK and another country has been negotiated at the highest level addressing specific human rights concerns in the country of return such assurances can be sufficient even if there is no provision for monitoring.[642]

Also to be named within the context of the legal framework is the Refugee or Person in Need of International Protection (Qualification) Regulations 2006. The transposition of the EU Qualification Directive into domestic law occurred via this Regulation[643] and amendments to the Immigration Rules (IR). So, this Regulation as well as the IR deal with exclusion from asylum and humanitarian protection that is based on the concept of subsidiary protection as included in the Qualification Directive. The IR contain the practical substance of immigration law and according to the IA 1971 they must 'include provision for admitting (in such cases and subject to such restrictions as may be provided by the rules, and subject or not to conditions as to length of stay or otherwise) persons coming for the purpose of taking employment, or for the purposes of study, or as visitors, or as dependants of persons lawfully in or entering the UK'.[644] The Rules do not have the status of legislation as they are administrative rules. However, they are binding and failure to act in accordance with the Rules can make a decision appealable.[645] Besides the Rules, several internal governmental instructions which set out the Home Office's determination criteria, are of importance. These instructions of which the majority is available on the government website

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642 Rikhof 2012, pp. 443-445.

643 Came into force on 9 October 2006. Besides the Qualification Directive, the UK is also bound by other EU Asylum Directives of the first phase: Temporary Protection Directive from 2001, Reception Directive from 2003, Asylum Procedures Directive from 2005 and the Eurodac (new version will be available from 20 July 2015 on) and Dublin (new version is available from 1 January 2014 on) Regulations. The UK did not opt-in to the recast Qualification, Asylum Procedures and Reception Conditions Directives which means it remains bound by the first-phase instruments. Neither is it bound by the Returns Directive. The Government explained with regard to the recast Qualification Directive that: 'Many of the proposals in the Directive are unobjectionable from our viewpoint as we already comply with the duties that they would impose on us'. Furthermore, the Government declared that it 'has concerns on a CEAS and will not opt-in into any proposal which would weaken the borders'.

644 Section 1 (4) Immigration Act 1971.

645 Kneebone 2009, p. 239.

provide guidance to immigration officers on, for example, the application of the Immigration Rules. Persons who come within the terms of an instruction can expect to be treated in accordance with the policy, aside from individual exceptions which may be made.

The Criminal Justice and Immigration Act 2008 contains a part on immigration which directly concerns Article 1F. The Special Immigration Status which is a restricted immigration status for foreign criminals including those to whom Article 1F is applied, is included in part 10. Aliens with such a status may be required to comply with conditions as to their residence, employment, and compulsory reporting to the police or a government office and failure to comply is punishable by imprisonment. Though the Act received Royal Assent on 8 May 2008, part 10 has not come into force yet.
The last piece of legislation to be stated is the Immigration Act 2014 (IA 2014) which received Royal Assent on 14 May 2014.[646] The government aimed to simplify and improve immigration law and with this Act some fundamental changes have been carried out. Sections which are of particular importance for those excluded under Article 1F concern among others, removal[647] and immigration bail.[648] Further, the right of appeal in most cases will be replaced by a system of administrative review in which Home Office staff, rather than the First-Tier Tribunal, will review the decisions of other Home Office staff (see section 15 of the IA 2014). This does not relate to excluded asylum seekers as those who have made an asylum (protection) or human rights application retain the right of appeal to the Tribunal. Section 19 which is also included in Part 2 ensures that the courts and tribunals have regard to the Parliament's view of what the public interest requires when considering Article 8 ECHR in immigration cases. This section has come into force and directly concerns excluded asylum seekers who are facing removal and have dependants in the UK. The issue of public interest in relation to Article 8 ECHR will be elaborated on later in this chapter when I deal with leave to remain on the basis of private/family life.

The above-mentioned laws are the ones relevant with regard to the exclusion clauses. However, it should be noted that the list is incomplete. Acts such as

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646 <http://www.legislation.gov.uk/ukpga/2014/22/contents/enacted> (last accessed on 21 September 2015).

647 Section 1 concerns the removal of persons unlawfully in the UK. It substitutes section 10 of the IAA 1999 and increases the powers to removal (came into force on 20 October 2014). Sections 2 and 3 are relevant in the case children are involved (came into force on 28 July 2014). Section 3 regulates the establishment of an Independent Family Returns Panel which has to be consulted in a family returns case on how best to safeguard and promote the welfare of children of the family.

648 Section 7 of the IA 2014 amends Schedule 2 IA 1971 and has come into force from 28 July 2014.

the Borders Act 2007 and the Terrorism Acts 2000 and 2006 also contain provisions which affect the application of Article 1F.

§ 6.2.1 Asylum and exclusion proceedings

Asylum applications can be filed at the port of entry or at a later stage after entry. In the latter case applications must be made in person at the Home Office in Croydon. A decision on exclusion is taken as part of the regular asylum determination process which is carried out by the Special Cases Unit of the Office of Security and Counter-Terrorism.[649] As determined in *Gurung*, the question whether or not a person falls under the exclusion clauses is not an optional one: it is an integral part of the Refugee Status Determination. The mandatory wording admits of no discretion.[650] With regard to the position of the Secretary of State, the judges stated that: 'even if exclusion issues are addressed first, it is highly desirable in the interests of justice that at all stages of his examination of an asylum claim he adopts a 'belt-and-braces' approach[651] and that he sets out in his Reasons for Refusal his decision on the appellant's position under both the inclusion and exclusion clauses as only such an approach can ensure that at any further appeal stage the adjudicator knows the Secretary of State's overall position'.[652] Also the government's Asylum Instruction on Exclusion (AI on Exclusion),[653] which provides guidance on the assessment of exclusion, states that an 'inclusion before exclusion' approach should be followed which means that case

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649 With regard to asylum applications in which exclusion does not play a role, the examination is carried out by the Home Office's Asylum Division falling under the directorate Visas and Immigration. Besides the Home Office, also the Foreign and Commonwealth Office is concerned with migration in the UK focusing on subjects from a foreign affairs perspective.

650 *Gurung v. State Secretary for the Home Department*, [2002] UKIAT 4870, 14 October 2002, para. 38.

651 This approach means that double security is provided, thus more than one method is used to ensure safety.

652 *Gurung* case, para. 148. The system of appeals to adjudicators (who were appointed by the Secretary of State) with the right of subsequent appeal to the AIT does not exist anymore. At the time of the judgment it did and with regard to adjudicators, the Tribunal held another view as it considered that adjudicators should first deal with the issue of exclusion whenever the claim disclosed an obvious issue of serious criminality. The Tribunal continued by stating that: 'we emphasize that the issue must be one that is obvious, since, if there is no clear evidence of serious criminality, there is too great a danger of being unnecessarily diverted away from examination under the inclusion clauses. Even if the Secretary of State has not raised the exclusion clauses expressly or by implication in the Reasons for Refusal letter, the adjudicator must address them when obvious issues arise'.

653 This instruction is dated 30 May 2012, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257429/exclusion.pdf> (last accessed on 21 September 2015).

owners should consider both whether an applicant has a well-founded fear of persecution as defined in Article 1A (2) of the Convention (inclusion) and then whether that applicant falls to be excluded by virtue of Article 1F (exclusion).[654] Though formally both inclusion and exclusion ought to be considered, which is in line with the UNHCR's approach, the practice differs. Information provided by the Special Cases Unit shows that when it is obvious that Article 1F applies, there is no further consideration given to the question whether the person falls under the refugee definition of the Refugee Convention: he is then excluded and ECHR matters are checked in order to see whether there is an obstacle for removal.[655] In this context, section 55 of the IAN Act 2006 should be mentioned. Pursuant to this section, the Secretary of State issues a certificate in the case of an asylum appeal of an alien to whom Article 1F applies. As a result of the certification, the First-Tier Tribunal or the Special Immigration Appeals Commission (SIAC)[656] must begin substantive deliberations on the asylum appeal by considering the statements in the Secretary of State's certificate and when they agree with those statements, such a part of the asylum appeal as amounts to an asylum claim (before considering any other aspect of the case) must be dismissed before hearing it. Thus, the claim for inclusion is not heard at all. In case of certification, the appellate authority is not prohibited from considering all the evidence but is required to make a decision in respect of Article 1F only.

§ 6.2.1.1 Part 11 of the Immigration Rules on Asylum

The procedures and principles by which asylum applications are decided are set out in part 11 of the IR.[657] In order to be granted asylum, an asylum applicant must satisfy the criteria in paragraph 334 of the IR. According to this paragraph, an applicant will be granted asylum if the Secretary of State is satisfied that: (ii) he is a refugee, as defined in Regulation 2 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006. Regulation 2 of the 2006 Regulations defines a 'refugee' as a person who falls within Article 1(A) of the Refugee Convention and to whom Regulation 7 does not apply. Regulation 7 sets out that a person is not a

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654 Kapferer 2000, p. 215.

655 The information is provided by a staff member of the Special Cases Unit at 25 November 2014.

656 The SIAC is set up by the Special Immigration Appeals Commission Act (SIACA 1997) in order to hear appeals against immigration related decisions involving national security, usually exclusion (both the ban and 1F), refusal of entry as an asylum seeker, deportation or appeals against deprivation of nationality. The IA 2014 inserted a new section 2E to the SIACA 1997.

657 Part 11 of the IR is annexed. See also the Asylum Policy Instructions from the UK Visa and Immigration Directorate Asylum which provide guidance on the proceedings <https://www.gov.uk/government/collections/asylum-decision-making-guidance-asylum-instructions> (last accessed on 21 September 2015).

refugee if he or she falls within the scope of Article 1F of the Convention and explains the construction and application of Article 1F (b) in a similar way to Article 12 (2) (b) of the Qualification Directive.[658] An alien who does not qualify for a refugee status can be granted humanitarian protection in the UK following paragraph 339C IR.[659] However, an excluded person who falls within the scope of Article 1F is also likely to be excluded from humanitarian protection (paragraph 339D of the Immigration Rules) and when protection is granted, it will be revoked if Article 1F should have been applied.[660] With the transposition of the Qualification Directive, a shift in assessment has taken place as previously, it was first examined whether an alien qualified as a refugee and then it was considered whether they were eligible for human rights protection under the ECHR. As stated above, currently the assessment of an asylum claim still comes first, after which humanitarian protection is assessed and thirdly a human rights claim is assessed under the ECHR.[661] When an alien qualifies for one of the categories, he needs specific permission from the immigration authorities to remain which is called 'leave'. There is leave to enter or leave to remain for a limited or unlimited period. The authorities can also grant temporary admission to an alien, which is usually done when the applicant is awaiting his proceedings. This kind of admission allows a person who is liable to be detained to be temporarily admitted to

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658 Regulation 7 (2) (a) states that the reference to serious non-political crime includes a particularly cruel action, even if it is committed with an allegedly political objective; (b) the reference to the crime being committed outside the country of refuge prior to his admission as a refugee shall be taken to mean the time up to and including the day on which a residence permit is issued. In line with the Qualification Directive, paragraph 339A states that a person's grant of asylum under paragraph 334 will be revoked or not renewed if the Secretary of State is satisfied that: he should have been or is excluded from being a refugee in accordance with Regulation 7 of Regulations 2006.

659 Those granted asylum or humanitarian protection are issued a residence permit for the UK which is valid for five years (see paragraph 339Q IR) after which the person is eligible for indefinite leave when each requirement of paragraph 339R IR is met.

660 See paragraph 339G of the IR regarding the revocation of humanitarian protection. An alien who is granted asylum and whereby afterwards appears he should have been excluded from a refugee status, the grant of asylum will be revoked under paragraph 339A IR. Paragraph 339BA prescribes that 'where the Secretary of State is considering revoking refugee status in accordance with these Rules, the person concerned shall be informed in writing that the Secretary of State is reconsidering his qualification for refugee status and the reasons for the reconsideration. That person shall be given the opportunity to submit, in a personal interview or in a written statement, reasons as to why his refugee status should not be revoked. If there is a personal interview, it shall be subject to the safeguards set out in these Rules. However, where a person acquires British citizenship status, his refugee status is automatically revoked in accordance with paragraph 339A (iii) upon acquisition of that status without the need to follow the procedure set out above'.

661 Storey 2008, p. 15.

the UK and they may be subjected to restrictions. Failure to obey may lead to detention again. Such a person can neither be removed nor is given leave: he is deemed not to have entered the UK.

Pursuant to paragraph 339J, the assessment of asylum, humanitarian protection or human rights claim must be carried out on an individual, objective and impartial basis including taking into account all relevant facts such as those relating to the country of origin/country of return at the time of taking a decision. Family members accompanying a principal applicant may be included in his application for asylum as his dependant and in case asylum or humanitarian protection is granted, the dependants will be granted leave to enter or remain for the same duration. In case of exclusion of the applicant, family members will also be refused protection, unless the dependant has a claim in his/her own right (paragraph 349 of the Immigration Rules).[662] It is relevant to mention here section 55 of the Borders, Citizenship and Immigration Act 2009 which ensures that immigration decisions are taken with regard to the need to safeguard and promote the welfare of children in the UK.[663] The statutory duty to children includes the need to demonstrate that asylum applications and considerations of exclusion issues are dealt with in a timely and sensitive fashion where children are involved. The burden of substantiating a claim is on the applicant, who must prove to the required standard that they qualify for international protection, in which the decision maker must consider the credibility of a claim in light of all available evidence relating to the claim. As explained above, the question of whether or not an alien falls under the exclusion clauses is also part of the RSD which means that besides the assessment of the question whether an applicant has a well-founded fear of persecution, the decision maker must also investigate exclusion elements.

Assessment of exclusion

While it is up to the alien to prove that he has a well-founded fear of persecution and qualifies for protection under Article 1A, in case of Article 1F, the evidential burden of proof rests with the Secretary of State. Fact finding in exclusion cases is done in the same way as for other asylum claims with the credibility of the alien being the essential criterion. Thus, the Asylum Instruction prescribes that the applicant must be given the opportunity to explain his level of involvement in the crime or act and the motivation or reasoning behind his alleged actions. Other sources on which

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662 See also paragraphs 350A and 352D IR in case the spouse/child is seeking to join an applicant who is granted a refugee status.

663 Section 71 IA 2014 confirms the duty which section 55 imposes on the Secretary of State or any other person. See also *ZH (Tanzania) v. State Secretary for the Home Department*, [2011] UKSC 4, 1 February 2011.

the authorities rely are, *inter alia*, Operational Guidance Notes[664] and the Home Office's Country of Origin Information Reports.[665] The latter report is based on information from documents of international organisations, human rights organisations, experts and state institutions. They attempt to focus on the main asylum and human rights issues in that country and also provide background information on geography, economy and history. The Home Office also has at its disposal the Country Guidance Cases which are binding as to a factual situation. The effect of such a Guidance Case is to establish the factual position until it is proved to have changed, which means that the Tribunal must consider new evidence and make a new decision.[666]

One of the questions the Supreme Court dealt with in the *Al Sirri and DD v SSHD*[667] case was the question what is meant with the words: 'serious reasons for considering' which is relevant regarding exclusion under Article 1F in general. In line with the view of the UNHCR to follow a restrictive interpretation of the exclusion clauses, the Supreme Court stated that 'serious reasons' are stronger than 'reasonable grounds' and that 'considering' is stronger than 'suspecting' or 'believing'. According to this Court, the standard required in criminal law does not have to be satisfied and it is unnecessary to import domestic standards of proof into the question. Furthermore, 'if the decision maker is satisfied that it is more likely to than not that the applicant has not committed the crimes in question or has not been guilty of acts contrary to the purposes and principles of the UN, it is difficult to see how there could be serious reasons for considering that he has done so. The reality is that there are unlikely to be sufficient reasons for considering the applicant to be guilty unless the decision maker can be satisfied on the balance of probabilities that he is. But the task of the decision maker is to apply the words of the Convention (and the Directive) in the particular case.[668]

Exclusion cases under Article 1F are sent to the Home Office's Special Cases Unit which is responsible for investigating matters concerning counter terrorism, national security, extremism and international crimes. The Unit

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664 These are Home Office policy documents and provide country specific guidance to case owners on particular asylum seeking groups.

665 The Country of Origin Information Reports are set up by the Country of Origin Information Service and monitored by the Independent Advisory Group on Country Information, which is part of the Office of the Chief Inspector of Borders and Immigration.

666 Clayton 2014, pp. 370-372.

667 *Al-Sirri v. Secretary of State for the Home Department*; *DD (Afghanistan) v. Secretary of State for the Home Department*, [2012] UKSC 54, 21 November 2012.

668 This approach is similar to what the Supreme Court decided in *JS (Sri Lanka) v. the Secretary of State for the Home Department*, [2010] UKSC 15, 17 March 2010.

handles 300 to 400 cases a year of which around 50 result in exclusion under Article 1F. Asylum applications in which 1F plays a role mainly concern aliens from Afghanistan, Iraq, Sri Lanka, Rwanda, Congo, Libya and Iran.[669]

Determining whether an alien is to be excluded under Article 1F happens in a few steps. First, it is up to case owner to determine that there is good reason to believe the individual committed the act or crime or significantly contributed to it, and is potentially excludable under one or more of the exclusion clauses. The AI on Exclusion states that exclusion under 1F is not dependent upon being part of an organisation, thus membership of, or employment in, an organisation which uses violence, or the threat of violence, as a means to achieve its political or criminal objectives is not enough on its own to make a person guilty of an international crime, and is not sufficient to justify exclusion from refugee status.[670] The individual's membership must be examined in the context of the organisation's behaviour at the time when he was part of the group. In *JS (Sri Lanka)*,[671] the Supreme Court decided that the exclusion clauses will apply if there are serious reasons for considering that the individual has voluntarily contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that the assistance will in fact further that purpose. The Court gave factors which have to be considered when deciding on complicity, these are among others, the nature and (potentially of some importance) the size of the organisation and particularly that part of it with which the asylum seeker was himself most directly concerned, how the asylum seeker came to be recruited and his position, rank, standing and influence in the organisation. This test is now applied in order to establish complicity, however the Special Cases Unit also relies on established principles of international criminal law, such as joint criminal enterprise (JCE), to assess whether someone should be excluded under Article 1F.

Once it has been established that the person committed or participated in the act, it is to be investigated whether he had the requisite understanding and intention at the time that he participated in or committed that act. The person intended to engage in the conduct at issue or to bring about a particular consequence and was aware that certain circumstances existed or knew that certain consequences would follow in the ordinary course of events. If the case owner considers that the alien acted with both 'intent' and 'knowledge' and thus had the necessary *mens rea* to be held individually

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669 The information is provided during an interview with a staff member of the Special Cases Unit at 22 April 2013.

670 This corresponds to the judgment of the ECJ in joined cases App. Nos. C-57/09 and C-101/09, *Bundesrepublik Deutschland v. B and D.*

671 *JS (Sri Lanka)* case.

responsible for the excludable act,[672] the last step before finally determining whether or not the individual is excludable, is to see whether one of the defences is applicable.[673]

No balancing test is applied with regard to the application of Article 1F. Thus, when considering whether or not Article 1F applies in the case of a person who appears to have a well-founded fear of persecution, there should be no balancing of the extent of persecution feared against the gravity of the 1F crime or act. This is explicitly laid down in section 34 of the Anti-terrorism, Crime and Security (ATCS Act 2001) which provides that exclusion from refugee status 'shall not be taken to require consideration of the gravity of events or fear' which may give rise to refugee status.

With regard to the interpretation of the exclusion clauses it can be mentioned that the definitions of the crimes laid down in Article 1F (a) are similar to those laid down in the UNHCR Handbook. When defining crimes against peace, war crimes or crimes against humanity, reference is made to international instruments drawn up to make provision in respect of such crimes, such as the Rome Statute of the ICC.[674]
According to Article 1F (b) of the Refugee Convention, the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: 'he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee'. Article 12 (2) (b) of the Qualification Directive expands this provision by prescribing that: he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; 'which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes'. When implementing the Qualification Directive into UK domestic law, Article 12 (2) (b) is adopted in Regulation 7 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, by which the addition to Article 1F (b) is also adopted.[675] By referring to the addition, the Asylum Instruction on Exclusion prescribes that a person who commits a serious non-political crime whilst applying for asylum and before being

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672 For the terms 'intent' and 'knowledge' the definitions as laid down in Article 30 of the Rome Statute of the International Criminal Court (ICC) is used. See Rikhof 2012, pp. 143-145 for more on *mens rea*.

673 As valid defences are stated: superior orders, coercion/duress or self-defence/defence of others**.**

674 Rikhof 2012, pp. 174-177.

675 With regard to Article 1F (a) and (b), Regulation 7 (3) also states that they shall apply to a person who instigates or otherwise participates in the commission of the crimes or acts specified in those provisions.

granted a residence permit in the UK, could also be excluded under Article 1F (b). This is a different approach to that of the UNHCR as according to that organisation, 'admission...as a refugee' does not refer to the period in the country prior to recognition as a refugee and sees admission in this context as the mere physical presence in the country. As discussed in Chapter 3, the general thought is that the Qualification Directive, which is based on a full and inclusive application of the Refugee Convention is in line with the UNHCR's interpretation. Continuous crimes, such as conspiracy to import drugs, which were committed before the asylum seeker came to the UK - and continued in the UK after arrival can be considered for the purposes of Article 1F (b) as 'being committed outside the country of refuge'. The UNHCR Handbook states that 'a serious crime' must be a capital crime (i.e. punishable by the death penalty) or a very grave punishable act.[676] According to the AI on Exclusion, it may be appropriate to clarify a serious crime as one for which a custodial sentence of 12 months or more upon conviction might be expected (if that crime had been tried in the UK) which is also in keeping with the provision for automatic deportation (section 32 (2) of the UK Borders Act 2007).[677] Furthermore, the AI sets out that as 'it is difficult to predict what sentence might be passed in relation to a particular offence committed abroad, the likely sentence is less important than the nature of the crime, the actual harm inflicted, and whether most jurisdictions would consider it a serious crime'. In the *T. v. SSHD* case,[678] the House of Lords held that Article 1F (b) applied to an asylum seeker who had been involved in terrorist acts which killed innocent people and rejected the argument that the acts were 'political' for the purposes of Article 1F (b). Therefore, under UK regulations, persons who engage in certain acts of terrorism may be excluded under Article 1F (b), as terrorist acts which are wholly disproportionate to any political motive will often be 'non-political'.[679] Besides clause (b), also 1F (c) is relevant regarding acts of terrorism as UN Security Council Resolutions 1373 and 1377 declare that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the UN' and 'knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations'. UK legislation broadened the scope of clause (c) as section 54 (1) IAN Act 2006 provides that acts contrary to the purposes and principles of the United Nations shall be taken as including, in particular: acts of committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence) and acts of encouraging or inducing others to commit, prepare or instigate terrorism (whether or not

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676 UNHCR Handbook 2011, Part 1, para. 155.

677 Asylum Instruction on Exclusion, p. 17.

678 *T. v. Secretary of State for the Home Department*, [1996] 2 All ER 865, House of Lords (Judicial Committee), 22 May 1996.

679 See Singer 2015 for more on terrorism and exclusion in the UK.

the acts amount to an actual or inchoate offence).[680] Further, section 54 (2) IAN Act 2006 defines 'terrorism' for the purpose of interpreting Article 1F (c) in UK law as having the meaning given by section 1 of the Terrorism Act 2000 (as amended by the Terrorism Act 2006). Under the Terrorism Act 2006 it is a criminal offence to directly or indirectly incite or encourage others to commit acts of terrorism. 'Encouraging' terrorism is broader than 'inciting' and includes the 'glorification' of terrorism.[681]
In the *Al-Sirri and DD v. SSHD* case mentioned above, Al-Sirri petitioned the Supreme Court seeking clarification of the correct interpretation of Article 1F (c). In its judgment the SC upheld what the Court of Appeal (CoA) had stated regarding the question: in construing Article 1F (c) in the domestic context, the meaning of terrorism was not as wide as that provided for in section 1 of the Terrorism Act 2000. This is because Article 1F (c) is given domestic effect by Article 12 (2) (c) of the Qualification Directive, which provides that a third country national or stateless person is excluded from being a refugee where there are serious reasons for considering that: (c) he or she has been guilty of acts contrary to the purpose and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations. The CoA concluded that Article 54 (2) 'has where necessary to be read down in an Article 1F case so as to keep its meaning within the scope of Article 12 (2) (c) of the Directive'. According to the Supreme Court, the appropriately cautious and restrictive approach of the UNHCR Guidelines on clause (c) should be followed. It could be enough if one person plotted in one country to destabilize another. The test was whether the resulting acts have the requisite serious effect upon international peace, security and peaceful relations between states.

The UK uses a national list in the form of organisations which are proscribed under the Terrorism Act 2000. The fact that a person may be on a list of terrorist suspects or be a member of an organisation designated as terrorist does not automatically lead to exclusion, but may be evidence of such involvement. According to the Asylum Instruction on Exclusion, applying the *JS (Sri Lanka)* test in terrorist cases would be answering the question whether the individual has voluntarily contributed in a significant way to the organisation's ability to pursue its purpose of committing acts of terrorism/

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680 The UNHCR has criticised the UK's interpretation of Article 1F (c) and is concerned that 'an automatic and non-restrictive use of Article 1F (c) to all acts designated as 'terrorist' may result in a disproportionate application of the exclusion clauses, in a manner contrary to the overriding humanitarian object and purpose of the 1951 Convention'. UNHCR is of the opinion that given the vague nature of clause (c) and potentially grave consequences, it must be read narrowly. <http://www.unhcr.org.uk/fileadmin/user_upload/pdf/UNHCRCommentsonCJIBJuly07.pdf> (last accessed on 21 September 2015).

681 ECRE Country Report 2005 - UK, p. 326.

serious crime (s), aware that the assistance will in fact further that purpose? Clause (c) covers all who commit an act which is contrary to the purposes and principles of the UN and not only those in power or a state or state like entity.[682]

When it appears from the investigation that Article 1F applies to an alien, the decision to refuse asylum on grounds of the exclusion clauses is taken after the decision maker has discussed the case with a senior caseworker. The following explains the proceedings after such a determination has been made.

Proceedings after exclusion determination

As laid down in paragraph 336 of the Immigration Rules, an application which does not meet the criteria set out in paragraph 334, including when the exclusion clauses apply, will be refused. Where an application for asylum is refused, the reasons in fact and law are stated in the decision and information is provided in writing on how to challenge the decision. When a refusal is based on the application of Article 1F, the case owner must specify which clause applies and, the same appeals rights apply as in a case where the claim has been refused without any reliance on these exclusion grounds and an immigration decision has been taken under section 82 NIA 2002. Until the introduction of the IA 2014, section 82 (2) listed 14 different decisions, including refusal of leave to enter the UK; refusal of entry clearance and refusal to vary a person's leave to enter or remain in the UK if the result of the refusal is that the person has no leave to enter or remain. Section 15 of the IA 2014 has substituted sections 82 and 84 NIA 2002 and repeals sections 83 and 83A NIA 2002 regarding appeal rights in respect of asylum claims. Since section 15 has been brought into force as from 20 October 2014, a person may appeal to the Tribunal where the Secretary of State has refused a protection claim; human rights claim or revoked the applicant's protection status.[683]

Where it is certified that section 55 of the IAN Act 2006 applies, the appellate authority will commence its deliberations by considering the Secretary of State's certificate (to the effect that the individual is excluded from the 1951 Convention by virtue of Article 1F). If the certificate is upheld, the appeal should be dismissed to the extent that it relies on asylum grounds, though any ECHR considerations raised in the appeal will still have to be taken into account.[684]

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682 See *KK v. Secretary of State for the Home Department*, [2004] UKIAT 00101.

683 <http://www.migrationwatchuk.org/briefing-paper/343> (last accessed on 21 September 2015).

684 Asylum Instruction on Exclusion, p. 14.

Article 1F cases are not automatically forwarded to the Crown Prosecution Service. Though several cases have been referred by the police, no conviction of such an alien has taken place until now. An alien against whom Article 1F is held and has been refused asylum is also excluded from humanitarian protection under paragraph 339C IR and is liable to be removed. Paragraph 338 IR states that: 'When a person in the UK is notified that asylum has been refused he may, if he is liable to removal as an illegal entrant, removal under section 10 of the IAA 1999 or to deportation, at the same time be notified of removal directions, served with a notice of intention to make a deportation order, or served with a deportation order, as appropriate'. An alien can be removed when he has no leave to remain, thus actually no permission to stay in the country, while deportation is often used for those who are criminally sentenced and actually means forced/escorted removal. The main difference between the terms has to do with their consequences. A person who is removed from the UK, can apply to return at any time, although depending on the situation, some people who are removed are prevented from returning to the UK for several years. A deported person is prohibited from re-entering the country for as long as the deportation order is in force and invalidates any leave to enter or remain in the UK given to him before the order was made. Accordingly a deportation order can apply to any foreign national in the UK even if they hold a valid visa.[685] When the Secretary of State certifies under section 97A (1) of the NIA Act 2002 that the decision to make a deportation order has been made on national security grounds, a deportation order may be made before any appeal is disposed of. This section disapplies section 79 of the same Act which states that a deportation order cannot be made where an appeal can be brought or is pending. The decision to remove or deport the alien allows the authorities to detain the person untill the removal/deportation is actually carried out as a person is liable to detention pending his removal from the UK. Detention can be imposed under Schedule 2 of the IA 1971, which concerns situations in which leave to enter is refused (concerns examination and removal) and Schedule 3 of the IA 1971 with respect to deportation.[686] The UK does not have a statutory time limit for aliens' detention and is not bound by the Returns Directive as it has not opted into this area of Union law. However, the UK has to respect Article 5 ECHR on the right to liberty and security.[687] Before the question

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685 In this report, I will in general use the term removal, unless it specifically concerns a forced removal which is to be noted with deportation. For more on removal and deportation see <http://www.communitylawservice.org.uk/images/uploadpics/removal_and_deportation.pdf> (last accessed on 21 September 2015).

686 When there is a power to detain, there is also a power to grant bail. Paragraph 22 of Schedule 2 of the IA 1971 deals with the grant of bail pending examination and removal, see footnote 627.

687 See S. J. Silverman & R. Hajela, 'Briefing Immigration Detention in the UK', University of Oxford, 6 February 2015.

regarding removal comes up, decision makers must consider whether the applicant would qualify for a human rights claim and thus receive leave.

§ 6.3 Leave (Human Rights Claim)

Where an applicant does not qualify for asylum or humanitarian protection, decision makers must consider whether the applicant would qualify under Article 8 ECHR. Among others, this question becomes relevant when the excluded alien has dependants in the UK and he is facing removal. These dependants may apply for asylum in their own right and such claims are considered on their merits. The AI on Exclusion prescribes that 'where it is proposed to remove the principal applicant (who has been excluded) but to allow a dependant to stay (or where it is proposed to remove a dependant covered by the exclusion clauses but not to remove the principal applicant who is not excluded), consideration will need to be given to whether removal of the excluded person would be a breach of Article 8 ECHR'. Though under Article 8 (2) of the ECHR, interference in an existing family life can be justified on the grounds that it is necessary and proportionate in order to prevent crime, also other interests have to be weighed. Since 9 July 2012, the Immigration Rules include provisions on family and private life. It is laid down in the IR that 'where the Secretary of State or an immigration officer is considering deportation or removal of a person who claims that their deportation or removal from the UK would be a breach of the right to respect for private and family life under Article 8 of the ECHR that person may be required to make an application under Appendix FM or paragraph 276ADE, but if they are not required to make an application, Part 13 of these Rules will apply'.[688]

If an applicant does not qualify on Article 8 ECHR grounds either, the last step for the decision maker is to consider whether Restricted Leave (RL) should be granted. Excluded asylum seekers under Article 1F of the Refugee Convention who cannot be immediately removed from the UK due to the *non-refoulement* principle as laid down in Article 3 ECHR, are from 2 September 2011 on, dealt with under the Restricted Leave policy.[689] This policy replaced the grant of Discretionary Leave (DL) for such individuals. Before dealing with Restricted Leave which is thus currently applicable, an overview will be given of the development of policy in the UK regarding those who are excluded but cannot be removed in which the Afghan hijackers case played a central role.

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[688] Paragraph 276ADE IR on private life and Appendix FM on family life are elaborated under § 6.3.6 and 6.3.7. Part 13 IR which concerns deportation and Article 8 ECHR will not be discussed as deportation is not particularly applicable to excluded asylum seekers under Article 1F.

[689] This policy was formerly known as the Restricted Discretionary Leave.

§ 6.3.1 The Afghan hijackers case

On 6 February 2000, a group of nine Afghan men fleeing the Taliban regime hijacked a Boeing 727 aircraft which had 180 passengers and seven crew members on board. Flight 805 was a domestic flight in Afghanistan, but the hijackers forced the crew to fly to Stansted Airport in Essex, England after stops in Tashkent, Aktobe and Moscow. The siege of the aircraft lasted until 10 February. Though they were convicted of hijacking and false imprisonment[690] in 2001 and sentenced to five years imprisonment, their convictions were quashed by the Court of Appeal in 2003, because the trial judge's summing up made an error in law which may have misdirected the jury. The hijackers sought asylum from the Taliban regime and in 2004 a panel of adjudicators ruled that the respondents had disqualified themselves from any entitlement to asylum by virtue of Article 1F (b) of the Refugee Convention and that removing the men to Afghanistan would breach their human rights in accordance with the Human Rights Act 1998 as they risked being killed if they were returned. The Home Secretary did not grant the men Discretionary Leave in accordance with the Home Office policy in force at that time, but gave them permission to remain in the UK on temporary admission which placed restrictions on them such as not being able to work or obtain travel documents. The High Court declared the policy unlawful and ordered the Home Secretary to grant them Discretionary Leave. According to the High Court, the Home Office was making 'an abuse of power by a public authority at the highest level' by ignoring its own laws which had allowed the men to stay. The Secretary of State then appealed to the CoA challenging the High Court's decision and arguing that the Home Office 'should have the power to grant only temporary admission to failed asylum seekers who are only allowed to stay in the UK due to their human rights'. On 4 August 2006, the CoA dismissed the appeal. The Court stated that the government's actions lacked parliamentary authority and commented 'so far as the powers of the Home Secretary are concerned, the challenges created by the respondent's presence in this country have been apparent since they landed here over 6 years ago. There has been ample time for the Home Secretary to obtain appropriate parliamentary authority, if he wished to be clothed with the powers he gave himself without parliamentary sanction'.[691]

When the Court of Appeal stated that the government lacked parliamentary authority, the Court was referring to the situation that temporary admission is linked to the power to detain. The Court held that 'temporary admission is available, as an alternative to detention, for people who have arrived in

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690 False imprisonment is a common law felony and a tort and means the restraint of a person in a bounded area without justification or consent.

691 *S & Others v. Secretary of State for the Home Department*, [2006] EWCA Civ 1157, 4 August 2006.

the UK, pending their examination by an immigration officer and pending a decision to grant or refuse them leave to enter. It is not intended for those who have been already examined by an immigration officer and refused leave to enter, but who have been found on appeal not to be removable, because removal would breach their human rights.[692] Leave to enter must be granted to such people'. The 'leave' mentioned here is Discretionary Leave which was applicable at time of the ruling and will be discussed briefly in the following.

Discretionary Leave

Since the abolition of 'Exceptional Leave to Remain' in 2003, there have been two possible types of leave granted following a successful human rights claim. These are humanitarian protection and Discretionary Leave which are granted under provisions of the IA 1971, allowing the Secretary of State to grant leave to a person for a reason not covered by the Immigration Rules. With the transposition of the Qualification Directive, the humanitarian protection has been consolidated in the IR and as seen earlier, a person is not eligible for humanitarian protection when he is excluded on the basis of Article 1F of the Refugee Convention. Before the introduction of Restricted Leave on 2 September 2011, Discretionary Leave was granted to those cases in which return would breach Article 3 ECHR but where humanitarian protection was not applicable.

Discretionary Leave is governed by the Home Office Asylum Policy Instruction on DL and is normally granted for three years.[693] Exclusion cases belonged to one of the exceptions to this rule as in such cases leave for six months was issued which could be extended with the same time period, when necessary.[694] Before extension, an active review took place to see whether the circumstances of the case had changed significantly. When it was decided that the alien did not qualify for further permission to stay in the UK, he/she had the right to appeal against the decision. After completing ten years of Discretionary Leave, the excluded alien would be eligible to apply for settlement.[695] Contrary to what is the case with the concept of temporary

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[692] For more on temporary admission see Kotzeva, Murray & Tam 2008, pp. 394-398.

[693] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257381/discretionaryleave.pdf> (last accessed on 21 September 2015).

[694] Leave granted for more than six months does not lapse on leaving the country, thus a person arriving in the UK with continuing leave does not require a new leave to enter. By granting Discretionary Leave for six months, it is not possible for the alien to travel in and out the country during this leave.

[695] Applications for indefinite leave to remain are made under paragraph 276B(i)(a) of the IR which relate to the ten years continuous lawful leave. After ten years of stay under Discretionary Leave, it was still possible that settlement would be denied in exclusion cases where the Minister decided that in light of all the circumstances of the case the person's presence was not conducive to the public good. When it was

admission, those granted this leave are eligible to work and have access to public funds.

The case of the Afghan hijackers caused a widespread political controversy and received great attention in the media. The then Prime Minister of the UK, Tony Blair, called the ruling 'an abuse of common sense'. The Home Secretary responded to the CoA's judgment by saying, 'I continue to believe that those whose actions have undermined any legitimate claim to asylum should not be granted leave to remain in the UK. I plan to bring forward legislation to do this as part of the early Bill to strengthen our immigration laws'. As the Home Secretary announced, the government included a part in the Criminal Justice and Immigration Act 2008 which deals with a new immigration status for foreign criminals, named the Special Immigration Status.

§ 6.3.2 Special Immigration Status

The Criminal Justice and Immigration Act[696] is a wide-ranging part of legislation which covers several policy matters.[697] The Act aimed at a simpler but more effective criminal justice system in the UK and led to important changes by, *inter alia*, creating new powers to deal with anti-social and violent behaviour and introducing a new community sentence for young offenders. The Act also includes clauses on pornography, offences relating to nuclear material and facilities and international cooperation in criminal matters. Relevant within the scope of this study is the introduction of the SIS for terrorists and serious criminals who cannot be removed from the UK for legal reasons. Part 10 of the Act gives effect to the Home Secretary's commitment following the Afghan hijackers judgment of the CoA: introduce legislation to deny leave to enter or remain to certain foreign nationals who cannot be removed from the UK or in other words, not to provide a safe haven for foreign criminals and terrorists.

According to clause 130 of the Act, the Secretary of State 'may' designate persons if they are foreign criminals who are liable to deportation but who

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not possible to remove the person, a further period of Discretionary Leave would be granted. In such cases, a new decision had to be taken every three years in order to decide whether settlement should continue to be denied. For more on the 'ten years long residence rule' see § 6.3.5.

696 <http://www.legislation.gov.uk/ukpga/2008/4/contents> (last accessed on 21 September 2015).

697 On 26 June 2007 the Criminal Justice and Immigration Bill was introduced into the House of Commons in the 2006/07 Parliamentary session by the Minister of State for Justice, David Hanson. The Bill was referred to committee and carried over to the 2007/08 session. It was reintroduced into the House of Commons by the Secretary of State for Justice (Jack Straw) on 7 November 2007.

cannot be removed as that would breach their rights under the ECHR. Also the family members of these foreign criminals may be designated if they did not make a claim on their own. Clause 131 of the Act states three categories of foreign criminals for these purposes among which those to whom Article 1F of the Refugees applies.[698] British citizens and others with the right of abode in the UK cannot be designated and there is no right of appeal against designation.[699] A designated person is not deemed to be granted leave and may not be granted temporary admission. Though these aliens are not in breach of UK immigration laws, time spent in the UK as a designated person may not be relied on by a person for the purpose of an enactment about nationality. It is also unlikely that a designated person would fall under the 'long residence' rule under which a person who has been in the UK continuously for twenty years may apply for settlement even if some or all of that period was without leave as settlement can in any case be refused on public interest grounds or following a criminal conviction.[700] As the Secretary of State for Justice (Jack Straw) at that time explained, 'the new SIS was to ensure that foreign criminals and terrorists who could not be deported could not expect a settled status in this country'. Thus, the main point of the status is not to grant leave merely as a result of the irremovability of foreign criminals which was the case under Discretionary Leave. Designated persons are subject to immigration control and not entitled to a number of benefits and tax credits.

Though these persons are allowed to stay in the country and work, conditions can be imposed on them. The conditions which are listed under clause 133 relate to residence, employment and reporting including the possibility of electronic monitoring. The breach of a condition without reasonable excuse is a criminal offence which can be punished with a fine of maximum £ 5000 and/or imprisonment of 51 weeks. Though the SIS is distinguished from temporary admission, the conditions that can be imposed and the available sentences after a breach are quite similar to those in case of temporary admission. Designated persons, who would be destitute, are entitled to support similar to asylum seekers under section 95 of Part VI of the IAA 1999. For the purposes of section 95 (3) IAA 1999 a person is considered to be destitute if a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living conditions are met) or b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs. Support can be provided in three ways, consisting of accommodation only, subsistence only (regular cash payments or both accommodation and subsistence.

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698 The other two categories are those convicted of a specified offence and sentenced to any period of imprisonment and those convicted of any offence and sentenced to two or more years imprisonment.

699 EEA nationals and their family members could be designated, but only if the effect would not breach their rights under Community treaties.

700 Research paper 07/65, House of Common Library, 9 August 2007, p. 106.

§ 6.3.2.1 Development of part 10

During the second reading of the Criminal Justice and Immigration Bill, which took place on 8 October 2007, Members of the Home Affairs Select Committee raised a number of concerns as expressed by several groups such as the Refugee Council which reported to find the creation of an additional form of status to be unnecessary, disproportionate and an inappropriate response. The Council stated that: 'though the government accepts these persons cannot be removed safely or to do so would be disproportionate to their family life it seeks to punish them and put them in an economic limbo. The means already exist to carry out the governments objectives'.[701] In accordance with these arguments of the Council, Member Heath expressed to find 'it impossible to reconcile the government's stated objective of simplifying immigration law and its introduction of an entirely new immigration status.[702] Liberty (The National Council for Civil Liberties) questioned whether the conditions can be seen as a backdoor route to criminalisation, as breach of a condition will be a criminal offence. Liberty also raised a concern with respect to the fact that spouse and children can be imposed with conditions.[703] With regard to the conditions attached to the SIS, the State Secretary stated during the reading that 'one of the aims of imposing conditions was to prevent a foreign criminal from establishing links with this country which might constitute an additional obstacle to his eventual deportation and another was to maintain contact with him and his family until such time as removal was possible'. Another point of concern related to the designation of persons under the term 'foreign criminal'. UNHCR questioned in its parliamentary briefing on the Bill whether it was appropriate to designate excluded aliens under Article 1F as foreign criminals.[704] The criticism refers mainly to section 54 of the IAN Act 2006 which according to the UNHCR leads to a broad interpretation of Article 1F (c) of the Refugee Convention.

Irrespective of the raised concerns, the clauses on the introduction of the new immigration status were agreed without division and amendment. With the insertion of part 10 in the 2008 Act, the government got what it wanted: ensure that 'foreign criminals', including those who fall under Article 1F of the Refugee Convention, are not issued leave due to their irremovability. However, seven years have already passed since the Act received Royal

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701 Refugee Council Briefing Special Immigration Status, October 2007, p. 7.

702 Research Paper 07/93, House of Common Library, 19 December 2007, p. 30.

703 <http://www.liberty-human-rights.org.uk/pdfs/policy08/criminal-justice-and-immigration-bill-second-reading-lords-january-2008.pdf> (last accessed on 21 September 2015).

704 <http://www.unhcr.org.uk/fileadmin/user_upload/pdf/UNHCRCommentsonCJIBJuly07.pdf> (last accessed on 21 September 2015).

Assent, and part 10 has still not yet come into force. According to information from the Home Office, the SIS will no longer enter into force: 'the Restricted Leave which replaced Discretionary Leave from 2 September 2011 on, can do the same job in a simpler fashion' and is the current applicable policy on those who are excluded from protection under Article 1F of the Refugee Convention which will be maintained.[705]

§ 6.3.3 Restricted Leave

The UK Border Agency[706] issued a policy statement on 2 September 2011 setting forth that, 'from 2 September 2011 on, all cases excluded from the protection of the Refugee Convention by virtue of Article 1F but who cannot be immediately removed from the UK due to Article 3 of the ECHR will be subject to a new, tighter, restricted leave policy'.[707] In such cases, Restricted Leave is granted to remain for a period of six months at a time, with the option for renewal, with some or all of the following restrictions: a condition restricting the person's employment, occupation or residence place, requirement to report regularly to an immigration officer and prohibiting the person to study at an education institution.

The Asylum Policy Instruction on RL (AI on RL) provides clearance on the conditions which can be imposed.[708] As mentioned above, those who are granted Restricted Leave are not allowed to start a study in the UK, which has to do with the temporary nature of the leave. Employment must be broadly interpreted and includes voluntary work. A person under this leave will normally be restricted in his right to work instead of totally denied.[709]

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[705] The information is provided during an interview with a staff member of the Special Cases Unit at 22 April 2013.

[706] The UK Border Agency was the border control agency of the British government and part of the Home Office. It was formed as an executive agency on 1 April 2008 and on 26 March 2013, following a critical report into the agency's incompetence by the Home Affairs Select Committee, it was announced by Home Secretary Theresa May that the UK Border Agency would be abolished and its work returned to the Home Office. Its executive agency status is removed as of 31 March 2013 and the agency is split into two new organisations; directorate UK Visas and Immigration responsible for deciding applications for leave to enter or remain in the UK, and 'Immigration Enforcement' is responsible for enforcing immigration law and removals.

[707] Article 1F related cases granted Discretionary Leave before 2 September 2011 remained on their existing leave until it was time for renewal. The renewal application was considered in line with the Asylum Instruction on Restricted Leave and granted Restricted Leave unless exceptional circumstances justify divergence from the published policy.

[708] Though the policy statement of September 2011 only concerned non-removable 1F applicants, the Asylum Policy Instruction on RL prescribes that also those who are refused under Article 33 (2) of the Refugee Convention, but cannot be removed due to *refoulement* should be granted RL.

[709] A total ban on work will be applied only in case of those posing a particularly high protection risk.

Work is permitted only with the consent of the Secretary of State which in practice means that the alien has to apply for consent to the designated case owner and provide the relevant details in order to ensure that a decision can be made. According to the AI, the presumption is that excluded persons should not be permitted to work or volunteer in a job which requires a Disclosure and Barring Service (DBS) check,[710] such as public sector jobs, healthcare and roles in the legal profession. Regardless of the question whether an employment condition is imposed or not, a case of an excluded asylum seeker who is granted Restricted Leave is referred to the DBS in order to let them consider whether the person is to be barred from working with children and vulnerable adults.[711] If an alien is not able to work, he is entitled to claim standard benefits such as jobseekers allowance and housing benefit when he shows to be destitute.

Though removal cannot be currently enforced regarding those who are granted Restricted Leave, they stay under review and will be removed at the earliest opportunity. Because of this, it is important for the authorities to know where the person is residing. The Asylum Policy Instruction on RL states that contact is maintained with the aliens who are free to reside where they want, but can be required to live in a specific area where the accommodation is publicly provided as well. Besides the condition to notify the Secretary of State of the home address and any change of address, aliens can also be obliged to request for prior consent to any change of address.[712] To monitor whether the person complies with the conditions, random home visits may be used.

All excluded aliens who are granted Restricted Leave have to report regularly to the Secretary of State, which is also a way of monitoring aliens. The frequency and location of the reporting centre depends on several factors, among others, the imminence of removal and the perceived risk of absconding. According to the Agency's policy document, monthly reporting should be considered to be the normal standards for Restricted Leave cases, which can be modified up or down.

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[710] This is the former Criminal Records Check. The merger of the Criminal Records Bureau with the Independent Safeguarding Authority in 2012 led to the Disclosure and Barring Service.

[711] <https://www.gov.uk/government/organisations/disclosure-and-barring-service/about> (last accessed on 21 September 2015).

[712] As each case has to be considered on its own facts and risks, in case of residence, the risks the person concerned may have towards individuals in his close neighbourhood have to be taken into account. It is also imaginable that the person will not be granted permission to live in a locality where there is a significant community from the alien's country of origin which could lead to problems if it becomes know that the person is living there.

The policy document also makes a note concerning the dependants of the excluded alien who is issued Restricted Leave. If family members are not granted protection in their own right, they will also fall under the Restricted Leave policy, with restrictions applied at a minimum level necessary to maintain contact with them and in case of children, the decision maker must pay attention to the impact the imposition of any condition on the excluded alien may have on them and decide what is appropriate in the particular case. When Restricted Leave is granted, an Immigration Status Document is issued to the person, which is accompanied by a letter stating the conditions and a statement that a failure to comply with a condition may lead to prosecution. If it appears from the review for renewal that the circumstances have changed and Article 3 ECHR forms no obstacle anymore, further leave will be refused and removal proceedings will begin.[713] Pending removal, the person can be on temporary admission/release or bail. With respect to this, the same restrictions may be imposed on the alien as in case he would have a grant of leave to remain, except with regard to employment, which is prohibited when the alien has temporary admission/release or bail.

§ 6.3.4 Comparison of different leaves regarding 1F[714]

Until the introduction of Restricted Leave in 2011, the solution of the UK government for those who are excluded under 1F but cannot be removed, was to provide Discretionary Leave. Those who were granted Discretionary Leave had no conditions attached to the leave and were free to work, travel, receive public funds/taxes and eventually claim settlement. The fact that these aliens were actually free to do as they liked, while at the same time they were denied protection because of excludable acts, was found to be inconsistent by the authorities. When the Court of Appeal in the Afghan hijackers case pointed to the government's own policy stated to stick to it or change it and this led to action. Though the Special Immigration Status has been introduced and has become statutory, it is not in force and neither will it be in force. The Restricted Leave can be considered to be its replacement and is the current leave which is issued to those who are excluded but cannot be removed.

Granting Restricted Leave for a period of six months, with the option for renewal is similar to Discretionary Leave which was previously granted to such excluded aliens. The difference of the new policy is, amongst others, that the alien does not have recourse to public funds, unless he is destitute and that now the same conditions may be imposed on the alien as determined in the SIS. The Special Immigration Status and Restricted Leave correspond

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713 The alien does have the right to appeal against the refusal to renew the leave.

714 Part 10 of the Criminal Justice and Immigration Act 2008 as well as the Asylum Policy Instructions on Restrictive and Discretionary Leave are annexed.

to each other as in both cases breach of a condition can lead to imprisonment and/or a fine[715] and when family members are not eligible for asylum on their own merits, they fall under the derivative status of their spouse. Both are besides the group of non-removable 1F applicants also applicable on those to whom Article 33 (2) of the Refugee Convention applies. According to this provision, a refugee cannot benefit from the *non-refoulement* principle in Article 33 (1) of the Refugee Convention when there are reasonable grounds for regarding him as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. For the term 'foreign criminal' in the Criminal Justice and Immigration Act, alliance is sought under section 72 of the NIAA 2002 which is applicable for the purpose of the construction and application of Article 33 (2) of the Refugee Convention. More important is the underlying notion of the SIS and Restricted Leave to prevent a prospect for settlement. Besides the public interest and protection also upholding the rule of law at international level is one of the rationales for imposing conditions to excluded aliens. The explanation given for the latter reason is that it means that 'the policy supports the principle that those excluded from refugee status, including war criminals, cannot establish a new life in the UK and supports our broader international obligations. It reinforces the message that our intention is to remove the individual from the UK as soon as is possible'.[716] Designation under SIS would make it impossible to apply for settlement,[717] while those who are granted Restricted Leave can formally apply for indefinite leave under the ten years long residence rule as was also the case under Discretionary Leave. However, as stated in the AI on RL, 'it will only be in exceptional circumstances that a person on Restrictive Leave will be eligible for settlement, which are likely to be very rare'.

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[715] Contrary to the SIS, no legislative change or the creation of a new status has taken place with respect to the power of attaching conditions under the Restricted Leave. This is based on section 3 (1) (c) of the IA 1971. It is laid down in the Criminal Justice and Immigration Act that the breach of a condition of those who are designated can be punished with a maximum sentence of 51 weeks of imprisonment and/or a fine of £ 5000. In case of Restricted Leave, the failure to observe a condition leads to an offence in the virtue of section 24 (1) (b) (ii) of the IA 1971 Act which can be punished with a fine of not more than £ 5000 and/or with imprisonment for not more than six months.

[716] Asylum Policy Instruction on RL, p. 3.

[717] An alien who had been given SIS status could not have applied for settlement, as time spent in the UK following service of notion of liability to removal or notice of intention to deport is not counted towards the years regarding the long residence rule as laid down in part 7 of the Immigration Rules.

§ 6.3.5 Ten years continuous lawful residence

Excluded asylum seekers under Article 1F who are issued Restricted Leave, qualify for indefinite leave to remain in the UK on the ground of long residence as laid down in paragraph 276B of the Immigration Rules. This paragraph sums up requirements that the applicant must meet to be eligible as follows:

1) he must have at least ten years continuous lawful residence in the UK;[718]
2) there must be no reason why granting leave is against the public good;
3) the applicant does not fall under the general grounds for refusal;
4) the applicant must meet the knowledge of language and life requirement;[719]
5) the applicant must not be in breach of UK immigration laws.[720]

The phrase 'continuous residence' under the first requirement is considered to be broken if the applicant has been absent from the UK for a period of more than six months at any one time or is absent from the UK for a shorter period but does not have valid leave to enter the UK on their return, or valid leave to remain on their departure from the UK or has spent a total of 18 months outside the UK throughout the whole ten year period. On the other hand, continuous residence is not considered broken if the applicant is absent from the UK for six months or less at any one time and had existing leave to enter or remain when they left and when they returned. This can include leave gained at port when returning to the UK as a non-visa national. With lawful residence is meant that the applicant, during his continuous residence, is in the possession of valid leave.[721]

It is beyond all doubt that in the application of a 1F applicant, requirements two and three will cause difficulties and give the Secretary of State a reason to refuse indefinite leave. The second requirement states that having regard

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[718] Applications which are received more than 28 days before the applicant completes the required qualifying period for long residence must be refused. This is because the applicant has not completed the required period of leave in the UK. The IR state that applicants who are refused under the Long Residence Rules, due to them submitting their application too early, can reapply once they have completed their qualifying leave or up to 28 days before this. If the applicant has one single short gap in lawful residence through making one single previous application out of time, by no more than 10 calendar days, and meets all the other requirements discretion might be used in favour of the applicant.

[719] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/302681/20140410_Immigration_Rules_-_Appendix_KOLL_MASTER.pdf> (last accessed on 21 September 2015).

[720] Pursuant to paragraph 276B (v), the exception is that any period of overstaying for a period of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain up to 28 days and any period of overstaying pending the determination of an application made within that 28-day period.

[721] See paragraph 276A IR.

to the public interest, there must be no reason which makes it undesirable to grant the applicant indefinite leave. Factors to be taken into account by the Secretary of State are the applicant's age, strength of connections in the UK, personal history,[722] domestic circumstances, compassionate circumstances and any representations received on the person's behalf. According to the Home Office's Guidance on long residence, personal history goes beyond criminal convictions and allows consideration whether the applicant's activities in the UK or abroad makes it undesirable to grant indefinite leave, which can include concerns about the applicant on the basis of national security, war crimes, crimes against humanity, serious criminality and other activities that make the applicant's presence in the UK not conducive to the public good.[723] Under the third requirement, an applicant must not fall under the general refusal grounds either.[724] One of the grounds under which leave to remain should normally be refused is 'the undesirability of permitting the person concerned to remain in the UK in the light of his conduct (including convictions which do not fall within paragraph 322 (1C)), character or associations or the fact that he represents a threat to national security'.

Besides the ground of public interest, the language requirement may also be difficult to meet for the applicant as it is required that he has a speaking and listening qualification in English at B1 level or above of the Common European Framework of Reference for Languages (CEFR). Though it is finally the Secretary of State's decision who will take into consideration all relevant factors of the case, which will vary in each situation, there is a big chance that an excluded asylum seeker under Article 1F will not be issued indefinite leave due to public interest.[725] A refusal means, in concrete, that the applicant is not eligible for settlement under the ten year long residence rule and will continue to be issued Restricted Leave for six months at a time as long as there are no changed circumstances which lead to another outcome. Moreover, the applicant will be considered on the grounds to leave under paragraph 276 ADE IR, the right to remain on the grounds of private life.

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722 Including character, conduct, associations and employment record.

723 Home Office, Long residence and private life, Guidance based on the IR (valid from 11 November 2013).

724 The general grounds for the refusal of entry clearance, leave to enter or variation of leave to enter or remain in the UK can be found in part 9 of the IR.

725 See *N, R (on the application of) v Secretary of State for the Home Department*, [2009] EWHC 1581, 3 April 2009 in which the judge expressed that: 'Thus if someone has been here for ten years and subjected to a series of discretionary leaves for that period he will normally be able to remain here indefinitely. He will, after all, be expected by then to have made his life in this country, to have settled here, perhaps to have established family life here. The view is, again as it seems to me, entirely reasonably taken that generally speaking - and of course each case has to be considered on its own merits - such an individual will have leave to remain indefinitely and thus will be entitled to settle here' (para. 22).

§ 6.3.6 Leave to remain on private life

From 9 July 2012 on, the Immigration Rules include specific provisions on how Article 8 ECHR considerations are to be applied in different types of cases of which paragraph 276 ADE is one. According to the authorities, previous versions of the IR had referred to the need to respect the ECHR, but had not sought to codify the factors relevant in Article 8 'balancing exercises'. This left a 'vacuum' that was considered to have been filled by the amendments. As is laid down in the Home Office's Statement of Intent: Family Migration dated June 2012: 'the new IR are intended to fill this public policy vacuum by setting out the Secretary of State's position on proportionality and to meet the democratic deficit by seeking Parliament's agreement to the Secretary of State's policy. The rules will state how the balance should be struck between the public interest and individual rights, taking into account relevant case law, and thereby provide for a consistent and fair decision-making process. Therefore, if the rules are proportionate, a decision taken in accordance with the Rules will, other than in exceptional cases, be compatible with Article 8'.[726] As stated earlier, by now also the new Immigration Act 2014 contains a section on Article 8 ECHR. Section 19 inserts a part 5 to the NIAA 2002 including three new provisions. Considerations are listed which the court or tribunal has to take into account when considering the public interest question in all cases and additional considerations in cases involving foreign criminals.

Before the changes of July 2012, there was legislation on settlement in the UK consisting of the ten years long residence and fourteen year rule. The first mentioned still exists and as discussed above, it is applicable to those who hold a valid leave to remain. The latter which was laid down under paragraph 276B(i)(b) IR has been replaced and subsumed within the current paragraph 276ADE IR on private life. From the 9th July 2012 on, no applications can be submitted under the fourteen year rule which was a type of amnesty which, subject to certain conditions, meant you could be granted settlement, even if you had an unlawful residence in the UK. This rule was a way out for many living illegally in the country, including those excluded asylum seekers under Article 1F in whose cases, *refoulement* did not form an obstacle for removal to their countries of origin, but who did not leave the UK anyway for some reason. A major change concerning the old fourteen year rule is that the period has been increased to twenty years of residence, whether lawfully or unlawfully. Thus, after twenty years of residence (not counting any period of imprisonment) an alien can apply for leave to remain in the UK on the basis of Article 8 ECHR, respect for private life.[727]

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[726] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257359/soi-fam-mig.pdf> (last accessed on 21 September 2015).

[727] <http://www.freemovement.org.uk/new-rules-on-long-residence/> (last accessed on 21 September 2015).

Paragraph 267A0 IR provides for a valid application made on the basis of private life to be waived where, among others, an Article 8 claim is raised as part of an asylum claim, or as part of a further submission, in person, after the asylum claim has been refused. The latter situation will often be the case of an excluded asylum seeker. In order to fulfil all requirements under paragraph 276ADE, the applicant must be suitable and eligible.[728] First, it is considered whether the applicant falls under refusal on the basis of any of the suitability grounds set out in Sections S-LTR 1.2 to S-LTR 2.3 and S-LTR 3.1 in Appendix FM. S-LTR.1.6 states that 'the presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK. Furthermore, 'the consideration whether the presence of the applicant in the UK is not conducive to the public good any legal or practical reasons why the applicant cannot presently be removed from the UK must be ignored'.[729] The refusal ground under S-LTR 1.6 is very similar to the public interest ground under the ten years rule and may again cause difficulties in the case of a 1F applicant. It is up to the Secretary of State to decide whether the grounds of suitability are met. According to section 19 IA 2014, little weight should be given to a private life or a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the UK unlawfully. Also little weight should be given to private life established by a person at a time when the person's immigration status is precarious. If the Secretary of State believes that the conditions are met and the applicant has lived continuously in the UK for at least twenty years, the applicant will be granted limited leave to remain on the grounds of private life for a period not exceeding thirty months. As laid down in paragraph 276DE IR, a stay of ten years of limited leave on the grounds of private life will make an applicant eligible for indefinite leave. Thus, to receive settlement under private life, a person needs to spend a period of thirty years in the UK. If the requirements of private life under paragraph 276ADE are not met, there may be exceptional circumstances which would make refusal and the requirement for the applicant to leave the UK a breach of Article 8.[730] The Home Office's Guidance on Long Residence and Private Life

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[728] With regard to the eligibility grounds it should be mentioned that in addition to the twenty years residence rule, there are three more subsections, namely: those who are under the age of eighteen and have lived in the UK for at least seven years; aliens who are aged eighteen or above and under twenty-five and have devoted half their lives in the UK and those who are aged and above and have no ties with the country where he would be returned to. See Home Office, Long residence and private life, Guidance based on the IR (valid from 11 November 2013) for more on paragraph 276ADE IR.

[729] S-LTR 3.1 Appendix FM.

[730] This is rarely applied as it is difficult for an applicant to fall under 'exceptional circumstances'.

states that 'exceptional' means circumstances when refusal and therefore removal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate under Article 8. To decide whether a case is exceptional an overall consideration of the facts is made and all relevant factors are considered.[731] Although under the Immigration Rules, family life and private life are considered separately and they are not cumulative, in the assessment whether there are exceptional circumstances which would make refusal of the application and removal from the UK a breach of Article 8, both family and private life are taken into account.[732]

We have seen above that an excluded asylum seeker who cannot be removed and is issued Restricted Leave may qualify for indefinite leave after a lawfully stay of ten years in the UK. The refusal of such a claim means in concrete that he has to wait for another ten years in order to be considered under the claim on private life. Though in both cases the public interest question will most likely lead to refusal of the application, it is still up to the Secretary of State to make an overall assessment and decide on the question whether the presence of the alien is undesirable and may thus be refused. Besides the claim on private life, Article 8 also relates to family life. In the following I will focus on the question whether an excluded asylum seeker would qualify for leave to remain on the basis of family life, should he have residing dependants in the UK.

§ 6.3.7 Leave to remain on family life

Rules on a claim with respect to family life are laid down in Appendix FM. As is stated in GEN.1.1., the route on family life is 'for those seeking to enter or remain in the UK on the basis of their family life with a person who is a British Citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection (and the applicant cannot seek leave to enter or remain in the UK as their family member under Part 11 of these rules)'. The right to family life will mainly play a relevant role in the case of an excluded asylum seeker who is facing removal and has dependants in the UK from whom he does not want to be separated. The spouse and/or children who possibly travelled along with the 1F applicant often make an asylum application on their own merits and when it is

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731 See Home Office, Long residence and private life, Guidance based on the IR (valid from 11 November 2013) for a discussion on the relevant factors, pp. 62-64.

732 It should be noted that in section 19 IA 2014 is laid down that, 'in the case of a person who is not liable to deportation, the public interest ground does not require the person's removal where the person has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK.

accepted, they receive protection and be issued with leave. The suitability grounds which the applicant has to satisfy are similar to those regarding the right to private life. Thus, as discussed above, there is a big chance that the Secretary of State decides that the applicant's presence in the UK is not conducive to the public good because of his 1F-background.[733] If it is decided that the suitability grounds have been satisfied, there are also eligibility requirements which have to be fulfilled in order to obtain a positive claim. Among these are, the applicant must not be in the UK under a valid leave granted for a period of six months or less or in breach of immigration laws, unless paragraph EX.1. applies.[734] In concrete this means that those excluded asylum seekers who cannot be removed from the UK due to *refoulement* and who have been issued Restricted Leave are not eligible for a claim on family life either, as Restricted Leave is granted for a maximum period of six months at a time. Excluded asylum seekers who are illegally residing in the country are in breach of immigration laws and are also not eligible for the right to family life. However, both may nevertheless be eligible to remain on family life grounds if: there is a genuine and subsisting parental relationship with a child in the UK who is under 18 and is a British citizen or has lived in the UK continuously for seven years prior to the application and it would not be reasonable to expect the child to leave the UK or they have a genuine and subsisting relationship with a partner in the UK who is a British citizen or settled in the UK or who has been given refugee leave or humanitarian protection and there are 'insurmountable obstacles' to family life continuing outside the UK. In paragraph EX.2. is laid down that 'insurmountable obstacles' means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

In these cases, successful applicants are granted permission to work, but are likely to be subject to a 'no recourse to public funds' condition unless they provide evidence of exceptional circumstances (e.g. that they are destitute). They become eligible for indefinite leave to remain after ten years' continuous lawful residence in the UK with temporary leave to remain.

In the *R (on the application of Nagre) v. SSHD* case,[735] the High Court dismissed a judicial review challenging the lawfulness of the amended Immigration Rules, in particular paragraphs 276ADE and section EX.1. According to the High Court, the amended Rules do not cover and provide for every conceivable case in which the Secretary of State may be found to be subject to an obligation under Article 8 to allow a foreign national to remain

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733 See S-LTR.1.6. Appendix FM IR.

734 See E-LTRP.2.1. and 2.2.

735 *R (on the application of Nagre) v. State Secretary for the Home Department*, [2013] EWHC 720 (Admin), 28 March 2013.

in the UK, but that there is nothing untoward in this, and it would not be feasible to produce clear and simple Rules that did so. The Upper Tribunal acknowledged in the *MF Nigeria* case[736] that the rules have legal effect not because they are law but because the legal structure of immigration appeals allows the rules a mandatory rank and, apart from discretion under them (i.e the rules), disallows judges from exercising a discretion differently from the Secretary State for the Home Department. It was explained that there was 'nothing unlawful about' the Secretary State's publishing guidelines giving effect to Convention obligations. Likewise it was also lawful for aspects of the public interest to be accorded weighty reasons for justifying interference. In this case and also in the *Izuazu Nigeria case*,[737] the Upper Tribunal confirmed the two-stage approach, which firstly concerns the application of the IR and secondly, the evaluation of Article 8 by 'applying the criteria as established by law'. The Home Office also refers to the two-stage approach when handling an appeal in family and private life cases. According to the Home Office this means that: first it must be considered whether the applicant meets the requirements of the rules, and if they do, leave under these rules should be granted. If not, the case worker must assess whether, based on an overall consideration of the facts of the case, there are exceptional circumstances. This is the case when refusal of the application would result in unjustifiable harsh consequences for the individual or their family such that refusal would not be proportionate under Article 8. If there are such exceptional circumstances, leave outside the rules should be granted. If not, the application should be refused.[738]

In the preceding paragraphs an outline is given on the application of Article 1F in the UK, with the main focus on the post-exclusion phase, thus the question what happens when an excluded asylum seeker cannot be returned due to *refoulement*. In order to complete the part on the UK, I will discuss case law on Article 1F in the following paragraph. Over the years, much jurisprudence has been developed on the application of the exclusion clauses of which some have already been discussed in the previous paragraphs. Besides the initial appeals against the refusal decisions, several topics relating

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[736] *MF Nigeria v. State Secretary for the Home Department* [2012] UKUT 00393 (IAC), 31 October 2012.

[737] *Izuazu Nigeria v. State Secretary for the Home Department* [2013] UKUT 45 (IAC), 30 January 2013, paras. 40-41.

[738] On appeal from the Upper Tribunal in the *MF Nigeria* case, [2013] EWCA Civ 1192, 8 October 2013, the solicitor on behalf of the Secretary of State made clear that the rules should be interpreted consistently with the Strasbourg jurisprudence. The Court of Appeal agrees with this and stated that a weighing of the public interest in deportation against 'other factors' must be a reference to all other factors which are relevant to proportionality and entails an implicit requirement that they are to be taken into account. See also M. Gower, 'Article 8 of the ECHR and immigration cases', Home Affairs Section, Standard Note: SN/HA/6355, pp. 19-24.

to Article 1F were discussed in proceedings. The following paragraph will provide an overview of the most relevant judgments on some specific topics.

§ 6.4 Case law

The UK does not have a single unified legal system as England and Wales have one system, Scotland another, and Northern Ireland a third. There are exceptions to this rule among others with regard to immigration law: the Immigration and Asylum Chamber's jurisdiction covers the whole of the UK. On 15 February 2010, the Immigration and Asylum Chamber of the First-Tier Tribunal took over the functions of the Asylum and Immigration Tribunal.[739] As there is also an Upper Tribunal, the UK returned to a two tier system as was the case before the establishment of the AIT in 2005.[740] If a party wants to appeal to the Upper Tribunal, permission may be given by the First-Tier Tribunal or the Upper Tribunal itself. When at appeal, the Upper Tribunal deems that an error of law has been made in the decision of the First-tier Tribunal, it can substitute its own decision in place of it, or order the First-Tier Tribunal to redecide the appeal. Decisions from the Upper Tribunal may be challenged by an appeal to the Court of Appeal (Civil Division) on a point of law for which permission is required either from the Tribunal or the appellate court itself. According to the Supreme Court, the grounds upon which permission may be granted in a second-tier appeal are that: 'the proposed appeal would raise some important point of principle or practice or there is some other compelling reason for the relevant appellate court to hear the appeal'.[741] The Supreme Court is the court of last resort and the highest appellate court which also deals with immigration cases.

Decisions which can be appealed are set out in sections 82-83A NIAA 2002. The refusal of asylum, whether based on Article 1F or not, is not an immigration decision for the purpose of section 82 and thus not appealable. An asylum applicant will have the right to appeal under this section only if the refusal is accompanied by a relevant immigration decision or when an immigration decision is made at a later date. Though such appeals are usually made to the Tribunal, there are cases when an appeal lies to the Special Immigration Appeals Commission instead. These cases concern national security and can relate to exclusion (both the ban and 1F), refusal of entry as an asylum seeker, deportation or appeals against deprivation of nationality. The Secretary of State is allowed to issue a certificate under section 97 NIA 2002 when an appeal is pending before the Tribunal whereby the case is transferred to the SIAC. The Commission can hear appeals on the same

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739 This is based on the Tribunals, Courts and Enforcement Act 2007.

740 Before 2005 a two tier system existed with the right to an appeal to adjudicators who were appointed by the Secretary of State with the right of subsequent appeal to the AIT.

741 Clayton 2014, pp. 213-214.

grounds as those which may come up in the Tribunal. If the Commission accepts a submission from the Secretary of State that it is necessary to rely on closed material (which would be against the public interest to disclose), it has the power to exclude anybody from a hearing, including the applicant and their representative. Decisions from the SIAC can be appealed to the Court of Appeal on a point of law.[742] The latter happened in the case of *ZZ v SSHD*[743] which led to a request for a ruling of the European Court of Justice on the matter. The Court of Appeal asked whether it was permissible for SIAC not to disclose to applicant the essence of the grounds which constituted the basis of the decision to refuse him entry to the UK. First, the court ruled that national security could not be used to deny a deportee the essence of the right to reasons and to appeal under articles 30 and 31 of the EU Citizens' Directive 2004/38. Second, the court stated that the national court must have power to examine all the grounds and related evidence against the deportee. Third, the national court can, in exceptional cases, order non-disclosure of grounds and evidence to the deportee, if the state proves that disclosure would in fact compromise state security and be disproportionate. Fourth, that the essence of the grounds for deportation must always be disclosed to the deportee in the appeal proceedings. This disclosure must be made in a manner that respects the confidentiality of the underlying evidence.[744]

Minors and exclusion

With regard to children, there cannot be 'serious reasons for considering' that a child has committed an international crime if that child is under the age of criminal responsibility which is ten years. The guidance of the Secretary of State for the Home Department in relation to young persons and children states that: 'though children are not exempt from the exclusion clauses,[745] it is important that the State Secretary carefully considers the specific context of each case, for example the child's age and maturity, when considering how far the individual should be deemed liable for their actions. It is always important to treat each case on its merit. Personal circumstances, such as age or psychological functioning, may be relevant when investigating the level of knowledge a person had of what they were participating in as well as the child's ability or power to take alternative action'.[746]

Though it only happens rarely that a minor is excluded from protection under Article 1F, there have been a few cases. The *R (ABC a minor) v.*

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[742] Idem, pp. 218-221.

[743] ECJ 4 June 2013, *ZZ v. Secretary of State for the Home Department*, App. No. C-300/11.

[744] <https://www.opensocietyfoundations.org/voices/case-watch-national-security-secrets-and-deportation> (last accessed on 21 September 2015).

[745] See paragraphs 351 and 352ZC IR with regard to unaccompanied asylum seekers.

[746] Guidance of the Secretary of State for the Home Department in relation to young persons and children, § 17.3.

SSHD[747] case concerned an Afghan national who arrived in the UK at the age of fourteen. His asylum application was refused on the ground that he was alleged to have committed a serious crime whilst in Afghanistan and he was also refused Discretionary Leave. The decision was issued in three separate letters in which the decision to refuse Discretionary Leave was somewhat modified in the third letter. It was decided that it was unsafe to remove him to his country of origin at present, but that the decision would be reviewed every six months by the Secretary of State. The applicant was sixteen at the time of the proceedings before the High Court which he asked for a judicial review regarding the decisions to refuse asylum and issue a six months renewable leave to remain. According to the court 'a starting point must be a correct analysis of the law in this country and the country where the crime is said to have occurred. The individual factual matrix of the alleged crime must be examined with care and the age and circumstances of the alleged offender are also important. The likely punishment, if found guilty, is also to be considered. The court also regarded it as being important that the minister keeps a sense of proportion and balance about the case. It is only when the matter has been examined in this way may the decision be regarded as lawful'. The court found that the decision to exclude the youngster and refuse asylum was not lawful as in this case 'there was simply no coverage, let alone analysis, of the culpability of the claimant, or even reference to the guidance of the Secretary of State herself as stated above'. With regard to the question of the grant of six monthly periods of Discretionary Leave, the court judged again against the state. The welfare of the applicant (minor), 'now sixteen and estranged from well-disposed members of his family (including and especially his mother) had not been pivotal when the decision to grant six month reviews had been taken. The court reasoned that the strain of not knowing whether he would face removal every six months was not in the best interest of a sixteen year old. The court also found that if the applicant were to have a fair trial for any alleged crime it should be conducted within a reasonable time. Since it would breach his Article 3 rights to return him immediately, the decision to review the case every six months is 'contributing to the unfairness of potential future proceedings in Afghanistan'.

Membership of a terrorist organisation

The *Gurung* judgment, which is mentioned earlier in this chapter has precedent value as a starred determination for the purpose of giving clarity regarding the exclusion clauses. The Asylum and Immigration Tribunal dealt with several aspects regarding the clauses in its judgment, including the question whether mere membership at the time of the commission of acts or crimes proscribed by Article 1F is enough to conclude that an appellant

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[747] *R (on the Application of ABC (A Minor) (Afghanistan) v. Secretary of State for the Home Department)* [2011] EWHC 2937.

should be excluded under this provision? The tribunal referred to the line of tribunal case law to the effect that mere membership of such organisations is not enough and highlighted two further principles.[748] The tribunal expressed agreement with the formulation in an UNHCR document that where there is sufficient proof that an asylum seeker belongs to an extremist international terrorist group such as those involved in the 11 September attack, 'voluntary membership could be presumed to amount to personal and knowing participation, or at least acquiescence amounting to complicity in the crimes in question'.[749] The AIT observed that it was necessary, in order to adequately reflect the realities of modern-day terrorism, that complicity in this type of case should be sufficient to bring an appellant within the exclusions: the terrorist acts of key operatives are often possible only by virtue of the infrastructure of support provided by other members who themselves undertake no violent actions. The second principle was that 'whilst complicity may arise indirectly, it remains essential in all cases to establish that the appellant has been a voluntary member of such an organisation who fully understands its aims, methods and activities, including any plans it has made to carry out acts contrary to Art 1F'. By way of illustration, the tribunal drew a contrast between the provision of a safe house for LTTE combatants and the transporting of explosives for them in circumstances where it must have been known what they were to be used for.[750]

Thus, following the previous case law, mere membership of a proscribed terrorist organisation was not sufficient to justify exclusion unless the organisation is so extreme that voluntary membership could be presumed to amount to at least acquiescence amounting to complicity.

In *MH (Syria), DS (Afghanistan) v. SSHD*,[751] the appellant (MH) appealed against a decision of the Asylum and Immigration Tribunal dismissing her asylum appeal. The appellant had been a member of the PKK, a proscribed organisation under the Terrorism Act 2000, for eleven years. She had worked as a nurse and engaged in other non-violent activities during that time. Dismissing her asylum appeal, the tribunal found that there were serious reasons for considering that she had been guilty of acts contrary to

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748 See for instance the PKK *Omer Dogan* case, No. 11793, 10 January 1995 in which the AIT decided that it is an error of law to exclude a person simply for their connections with a group or organisation, as the question of exclusion must be decided in reference to the individual and not the organisation.

749 UNHCR Addressing Security Concerns without Undermining Refugee Protection: UNHCR's Perspective, 29 November 2001, para. 18.

750 Paras. 104-108 of the judgment.

751 *MH (Syria) v. Secretary of State for the Home Department: DS (Afghanistan) v. Secretary of State for the Home Department,* [2009] EWCA Civ 226*CA (Civ Div226), 24 March 2009.*

the purposes and principles of the UN, so that she was excluded by article 1F (c) of the Convention.[752] The Court of Appeal judged that the tribunal had failed to apply the guidance in *Gurung* as explained above. MH had been only thirteen when she joined the PKK and her activities for the organisation were relatively minor. Further, there was no suggestion that the PKK fell at the extreme end of the continuum referred to in *Gurung* where mere membership might be sufficient to establish complicity in the acts of an organisation.

The question with regard to the second applicant, DS, in the case concerned one of complicity which will be dealt with in the following.

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[752] The tribunal's reasoning on the asylum appeal No. 5: "… [W]e find that there are serious reasons for considering that the appellant has been guilty of acts contrary to the purposes and principles of the United Nations (Article 1F (c)). The appellant had voluntarily become a member of the PKK in 1993 and this is an organisation whose main aim is to set up an independent Kurdish state in southeast Turkey. The PKK is involved in illegal military operations and is proscribed by the UK as a terrorist group by Schedule 2 of the Terrorism Act 2000. The appellant left school when she was 12 years old but after meeting Abdullah Ocalan, she decided to join the PKK after attending a ceremony when two of her cousins who had been killed as guerrillas were declared as national heroes. Although the appellant was still young at the time, she was elected to carry a banner in a large demonstration in support of El-Assad who in turn was supported by the PKK. During this demonstration the appellant was beaten by security officers after which she left the PKK. The PKK wanted them to be armed and she volunteered for this. She passed over into Iraq at the beginning of 1994. The appellant had a duty of resolving disputes on behalf of the PKK and in 1996 after three months training in first aid, she became an assistant/nurse in the hospital in the camp. She found she was suitable for this particular duty as she was not afraid of handling injured people. The appellant then visited PKK camps in the mountains to make them more informed about the guerrillas' situation in the mountains. She visited a hospital there, which was particularly educational for her. We found that although the appellant did not have a high level role in the PKK, she was fully aware at the time of the activities of the PKK and from her SEF statement, there is no indication that she was unhappy about her role with the PKK and supporting it through her duties. It was during a visit to the Shehid Ayhan camp, that she got caught up in a clash between the Turkish security forces and the PKK after which she received severe injuries from a mine in November 1997. Until this point the appellant was a voluntary member of the PKK and had personal knowledge of their activities which involved illegal military operations and she supported their infrastructure for this by her nursing the wounded and other duties. The appellant did not ask to resign from the PKK until 2003. Although it had been decided in 1996 that she would not be a fighter she contributed to the PKK by other means. The burden of proof is on the respondent to show that there are serious reasons for considering that the appellant has been guilty of acts contrary to the purposes and principles of the United Nations and we find that by her involvement with the PKK, that she is therefore excluded by Article 1F (c) from benefiting from the 1951 Convention for refugees."

Complicity

As discussed above, the test for complicity as expressed in *JS (Sri Lanka)* is that Article 1F will apply if there are serious reasons for considering that the individual has voluntarily contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that the assistance will in fact further that purpose. *In MH (Syria) and DS (Afghanistan) v. SSHD* [2009] the Secretary of State sought to exclude DS under Article 1F (a) because of various senior positions he had held within the KhAD (the intelligence service of the communist government in Afghanistan in the late 1980's). The Court found that the evidence did not establish that the KhAD had committed widespread torture or killings directed at the civilian population and that these acts did not fall under crimes against humanity to the international statutes. This is why DS's asylum claim could not be excluded under clause (a). The Court also rejected an argument that the judge should have considered whether any of the other exclusion clauses applied, even though the Secretary of State had not sought to rely on the, as it was not obvious that they applied.[753]

In *SK (Zimbabwe) v. SSHD* the female applicant had been involved in farm invasions in Zimbabwe and the question was whether her participation in them made her criminally responsible. The Upper Tribunal states to accept the generality of the evidence, and specifically that no one was murdered. Also that she was a lesser participant, and that others, below the ringleaders, were more active and brutal. However, the Tribunal expressed that the appellant was not merely present. She was on each occasion a voluntary, even if reluctant, actual and active participant in beatings; even taking her evidence at face value, beating many people hard as part of the aim of driving them away. She specifically tried to demonstrate her loyalty to Zanu-PF in her actions. According to the judges, applicant was plainly criminally liable on a joint enterprise domestic law basis. Furthermore, 'if there is an additional requirement that, in these circumstances, there be a substantial contribution to the crime, we consider that she provided it. That expression is not intended to exclude all but ringleaders and major participants. Each of those who guard extermination camps, for example, make a substantial contribution to genocide'.[754] In the *AA (Iran) v. SSHD* case, the Court of Appeal found the applicant to be complicit: 'even though he had not himself tortured or abused civilians, as a long-serving local commander of the Bassij, on his own evidence he had handed individuals over knowing that they would be seriously ill-treated and 'closed his eyes' to abuses by others. He

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[753] The exclusion net, 'Joe Middleton on recent exclusions under the Refugee Convention', 29 May 2009. http://www.newlawjournal.co.uk/nlj/content/exclusion-net (last accessed on 21 September 2015).

[754] *SK (Zimbabwe) v. State Secretary for the Home Department*, [2010] UKUT 327 (IAC), 15 September 2010, paras. 41-44.

had seen the injuries resulting from torture and beatings and had felt uneasy but continued to hand over people'.[755]

Detention pending removal

Excluded asylum seekers in whose case the ECHR no longer plays anymore or did not play any role, do generally not qualify for leave to enter or remain in the UK and ought to be returned to their country of origin. These aliens may be detained pending arrangements for the removal under Schedule 2 of the IA 1971. Schedule 3 of the same Act, concerns detention in the case of deportation. In the *R (Hardial Singh) v. Governor of Durham Prison*[756] case important principles regarding the use of powers to detain someone for immigration purposes are set out, which have become known as the *Hardial Singh* principles: 'the Secretary of State must intend to deport or remove the person and can only use the power to detain for that purpose; the detainee may only be detained for a period that is reasonable in all the circumstances; if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation or removal within a reasonable period, he should not seek to exercise the power of detention; the Secretary of State should act with all diligence and expedition to effect removal. Thus, while the power given to the Secretary of State to detain aliens is not subject to an express time limit, it is set to be bound by these principles.[757] After the *Hardial Singh* case, several judgments with respect to the question whether detention pending removal was lawful are passed, including those concerning the duration of the detention. Accordingly, it is amongst others decided, that the phrase 'pending removal' in paragraph 16 (2) of Schedule 2 of the IA 1971 means 'until removal'. If the Secretary of State continues to order the removal of the detainee, then they can continue to be detained until their removal was possible.[758] According to the High Court, the continued detention of a failed asylum seeker, who had already spent over 21 months in detention, would be unlawful due to being unreasonable and disproportionate in cases of low risk of reoffending. Especially when there was uncertainty over the length of time of further detention. A high risk of absconding could be solved by applying appropriate conditions of reporting such as electronic tagging.[759] In the *Stephen Masimba Kambadzi* case, the Supreme Court decided that failures by the UK Border Agency to conduct regular reviews of detention, regardless of whether that

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755 Clayton 2014, p. 478.

756 *R (Hardial Singh) v. Governor of Durham Prison*, [1984] 1 All ER 983, [1984] 1 WLR 704, [1983] Imm AR 198, 13 December 1983.

757 As well as by Article 5 (1) (f) ECHR.

758 *R (on the application of Khadir) v. State Secretary for the Home Department*, [2005] UKHL 39; [2006] 1 AC 207.

759 See *inter alia*, *R (on the application of A (Iraq)) v. Secretary of State for the Home Department*, [2010] EWHC 625 (Admin), 19 February 2010.

review would have led to release, made the detention unlawful. This was so even though there had been no breach of the *Hardial Singh* principles.[760] According to the Supreme Court, these principles which are still in place, should not be applied rigidly; specific circumstances to the case must be taken into account.[761]

§ 6.5 Conclusion

The exclusion clauses under Article 1F attracted interest in the UK after the attack on the Twin Towers in the USA. From 2002 on, the government took various steps, such as publishing a white paper in which it announced that the UK should not provide a safe haven for war criminals or those who commit crimes against humanity and set up a Special Cases Unit which is responsible for investigating matters concerning national security and international crimes. Several Acts contain relevant provisions in relation to the application of Article 1F, including the Human Rights Act 1998, Refugee or Person in Need of International Protection Regulations 2006 and the Immigration Rules. The assessment of exclusion is part of the asylum proceedings as prescribed in part 11 of the IR and an inclusion before exclusion approach is formally directed by the government. An alien who is excluded under 1F does not qualify for a refugee status or humanitarian protection. Though refusal makes a person liable to removal, it has to be examined whether the alien would qualify for a human rights claim.

With regard to those excluded asylum seekers who cannot be removed due to Article 3 ECHR several developments occurred during the past years in which the judiciary also played an important role. In the *S & Other v. SSHD* case (known as the Afghan hijackers case) the hijackers were refused asylum and Article 3 ECHR was an obstacle for removal. When the Home Secretary did not grant these men Discretionary Leave in accordance with the Home Office policy at that time, but gave them permission to remain in the UK on temporary admission, the High Court and Court of Appeal blew the whistle on the Home Secretary. The CoA stated that the government lacked the parliamentary authority to do so, as temporary admission is available as an alternative to detention for people who have arrived in the UK and are awaiting their proceedings. According to the court, those whose asylum case has already been examined and were found not to be removable due their human rights, cannot be left to live in limbo. This judgment caused a widespread political controversy and it led to action on the part of the UK Home Secretary. The government wanted to change the situation whereby

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760 *Shepherd Masimba Kambadzi v. State Secretary for the Home Department*, [2011] UKSC 23, 25 May 2011.

761 *Walumba Lumba v. State Secretary for the Home Department; Kadian Mighty v. State Secretary for the Home Department*, [2011] UKSC 12, 23 March 2011.

excluded asylum seekers who could not be removed were free to do as they liked and received settlement. Therefore, it introduced the SIS for terrorists and serious criminals, including excluded asylum seekers under Article 1F, who cannot be removed from the UK. An alien who is so designated is not granted leave and may not be granted temporary admission. Nevertheless, he has certain rights which can be restricted with imposed conditions regarding work, reporting and residence. Though the Criminal Justice and Immigration Act received Royal Assent in 2008, part 10 on the Special Immigration Status has not come into force yet. Currently, Restricted Leave is issued to those who are excluded but cannot be removed due to *refoulement*. From 2 September 2011 on, Restricted Leave replaced Discretionary Leave with the main difference that as is determined with regard to the SIS, also under Restricted Leave, conditions may be imposed on the alien. In addition, Restricted Leave is issued for a period of six months and after at least ten years continuous lawful residence in the UK, an excluded asylum seeker may qualify for settlement. Among the requirements of this rule are that there must be no reason why granting a permanent permit is against the public good and that the applicant does not fall under the general grounds for refusal. The public interest ground will present difficulties in the application under this rule, but at the end it is up to the Secretary of State to make a final decision after considering all fact of the day of the case.

Besides Article 3, Article 8 ECHR is often at stake in the case of an excluded asylum seeker, particularly when the alien is facing removal and has dependants in the UK. From July 2012 on, the IR include specific provisions on how Article 8 ECHR considerations are to be applied in different types of cases. The fourteen year rule which existed alongside the ten years long residence rule has been replaced and subsumed within the current paragraph 279ADE IR on private life which increased the period of residence, whether lawfully or unlawfully, up to twenty years. The claim on family life is laid down in Appendix FM. Both claims require the person to satisfy the suitability and eligibility grounds which, *inter alia*, state that the presence of the applicant in the UK is not conducive to the public good because their conduct, character, associations, or other reasons, make it undesirable to allow them to remain in the UK. Like under the ten years long residence rule, the public interest ground will raise difficulties in such applications and outweigh the family or private life of the alien. Also the Immigration Act 2014 contains a section on Article 8 ECHR in which considerations are listed which the court or tribunal has to take into account when considering the public interest question in all cases and additional considerations in cases involving foreign criminals. When a person does not satisfy the requirements as laid down in the IR and is refused leave on the basis of Article 8 ECHR, the Secretary of State still has discretion powers to grant leave outside the rules.

Chapter 7 Comparison on the application of Article 1F in the Netherlands and the UK

§ 7.1 Introduction

The previous two chapters dealt with the application of Article 1F in the Netherlands and the UK. I have tried to reflect on my understanding of the provision by stating, *inter alia*, how these countries have developed their policy on 1F, how their assessment of exclusion takes place and I have especially focused on the question what the practice is regarding excluded asylum seekers who cannot be removed due to *refoulement*. Though both countries ratified the Refugee Convention shortly after its date of commencement, there is a difference in the periods adopting legislation on asylum. The Aliens Act 1965 of the Netherlands contained a special asylum procedure, including a provision on Article 1F, while the UK did not apply detailed legislation on asylum until 1993. Until 1993, the provisions of the Convention were factors to be taken into account, but not directly enforceable as they had not yet been incorporated yet into domestic law. Both countries as being EU Members States, have implemented the relevant asylum Directives of the first phase into their domestic legislation, including the Qualification Directive which gives a definition of the term 'refugee' and states who is to be excluded from protection. Contrary to the Netherlands, the UK government chose not to participate fully in the reform process which led to recasts.[762] This means that the UK remains bound by the first-phase instruments.[763]

The exclusion clauses drew political attention in the Netherlands at the beginning of the 1990s. The arrival of Afghan asylum seekers (mainly KhAD/WAD members) who served during the communist regime in Afghanistan and were the oppressors of the first influx of asylum seekers, raised questions. It finally led to the official report of 2000 on the KhAD/WAD which is a main part of the basis of the policy/legislation development regarding Article 1F. Excluded asylum seekers in the Netherlands do not only consist of Afghan men. However, as everything still revolves around the ex-KhAD/WAD members and their families, they have a decisive role in the 1F discussion. The discussion in the UK about 1F started almost a decade later. The provision became the centre of interest in the UK from 2002 onwards.

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[762] See Chapter 3 on the EU legislation for an elaboration regarding the Asylum Directives.

[763] With regard to the exclusion and revocation clauses of the recast Qualification Directive can be mentioned that no amendments have been made to Articles 12, 14, 17 and 19. Also Article 21 on protection of *refoulement* is unmodified.

The white report 'Secure Borders, Safe Haven' in response to the attack on the Twin Towers, the *Gurung* judgment and later on the Afghan hijackers case have all contributed to the policy development.

Both countries have a very clear common goal, which is that 'they do not want to provide a safe haven for war criminals or those who commit crimes against humanity'. This raises the question, how do they interpret this common goal. In the following paragraphs, the two countries will be compared with regard to a number of relevant aspects relating to exclusion in order to gain an insight into the similarities and disparities in the way they deal with the issue. The aspects which will be discussed are the assessment of exclusion, practice regarding those who are unremovable, in other words the post-exclusion phase, and the role of Article 8 ECHR, after which a conclusion will follow.

§ 7.2 Assessment of exclusion

In the Netherlands as well as in the UK, the decision on exclusion is taken as part of the regular asylum determination process. Though both countries follow the approach that 'when a person falls under the exclusion clauses, he should be excluded', their policy differs when Article 1F is involved in the RSD. In the Netherlands, an asylum application is first tested against Article 1F instead of Article 1A of the Refugee Convention, the so-called 'exclusion before inclusion', while the UK formally applies 'inclusion before exclusion'.[764] As explained by the Tribunal in the *Gurung* case, 'only such an approach can ensure that at any further appeal stage the Secretary of State's overall position will be known'.[765] This practice is in accordance with the UNHCR's line of thought which states that such an approach, *inter alia*, enables a fuller understanding of the circumstances. According to the Netherlands, there is nothing stated in the Refugee Convention which indicates that Article 1A should be dealt with first. The highest administrative court supports this view and finds that 'the serious character of Article 1F makes it necessary to find out first whether the Refugee Convention is applicable before looking at the question whether there is a matter of persecution in the sense of the Convention'.[766]

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[764] Though the Asylum Instruction on Exclusion states that inclusion before exclusion applies, information provided by the Special Cases Unit shows that when it is obvious that Article 1F applies, there is no further consideration given to the question whether the person falls under the refugee definition of the Refugee Convention: he is then excluded and ECHR matters are checked in order to see whether there is an obstacle for removal.

[765] *Gurung* case, para. 148.

[766] Kosar 2013, pp. 95-101.

The Netherlands has drawn up the exclusion clauses in its domestic law as is laid down in the Refugee Convention and follows the UNHCR interpretation. With regard to the UK the implementation of the Qualification Directive into domestic law, the addition to clause (b): 'which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes', has been adopted.[767] Thus, a person who commits a serious non-political crime whilst applying for asylum and before being granted a residence permit in the UK, could also be excluded under Article 1F (b) which is a different approach than that from the UNHCR as according to the UNHCR 'admission...as a refugee' does not refer to the period in the country prior to recognition as a refugee and sees admission in this context as the mere physical presence in the country. Though the Qualification Directive has an addition to clause (b), as it is based on a full and inclusive application of the Refugee Convention, the general thought is that clause (b) should be applied in line with the UNHCR's interpretation. While the Netherlands hardly uses clause (c) as an independent ground,[768] the UK broadened the scope of this clause in virtue of Article 54 (2) IAN Act 2006. However, according to the Supreme Court, an appropriately cautious and restrictive approach of the UNHCR Guidelines on clause (c) should be followed.

Both countries have a special unit to investigate 1F cases, thus when an alien is heard as a result of his asylum application and information is brought up which might be interesting within the scope of the exclusion clauses, the case will be referred to the special units for investigation. The unit in the Netherlands is called the 1F-unit and focuses only on the exclusion clauses, while the Special Cases Unit in the UK is responsible for a broader work area. Besides 1F, also others matters concerning counter terrorism, national security and extremism are investigated by the unit. The specially trained officials are capable of formulating questions which go into particulars to find out whether the person has participated in a certain international crime. The information given by the alien, in combination with the country of origin data from the unit in question, will eventually lead to a decisive answer with respect to the investigation.[769]

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[767] Article 1F (b) of the Refugee Convention reads as: 'he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee'.

[768] Article 1F (c) of the Refugee Convention reads as: 'he has been guilty of acts contrary to the purposes and principles of the UN'. Until 2006, clause (c) was not used as an independent grounds but mostly in combination with clause (a). After the change of policy in 2006, it has only been applied in two cases.

[769] Moore & Van Wijk 2015, pp. 94-95.

The 'data' as mentioned above are collected by the Country of Origin Information Service in the UK and the Asylum and Migration Affairs Division and the Country and Language Information Unit in the Netherlands, respectively.[770] The Netherlands knows country reports which contain e.g. regular and individual reports, while the UK has, *inter alia*, Operational Guidance Notes and the Country of Origin Information Reports.[771] The primary sources of information are institutions in the country of origin directly involved in gathering information such as embassies and NGOs. Also fact-findings missions are organised to the countries and other sources include reports from international/human rights organisations and experts.

In the UK, embassy reports are only used as background information and all source documents are made public: information that cannot be made public is not quoted. This is not the case in the Netherlands where also confidential information is used in reports. On the other hand, in the UK, administrative decisions refusing entry into national territory that are adopted on the basis of information whose disclosure would be liable to prejudice national security, may be contested before the Special Immigration Appeals Commission. In such proceedings, neither the person who has contested such a decision nor his own lawyers have access to the information upon which the decision was based when its disclosure would be contrary to the public interest. However, in such a case, a special advocate, who has access to that information, is appointed to represent the interests of the person concerned before SIAC. The special advocate cannot communicate with the person concerned about matters connected with the proceedings once material which the Secretary of State (the competent UK authority) objects to being disclosed has been served on the special advocate. The special advocate may, however, request directions from SIAC authorising such communication.[772]

The Advisory Panel on Country Information is the formal monitoring body of the reports in the UK. Though the Netherlands does not have such a body, the court assesses in appeal cases the quality of the background reports on which the country report is based. These background reports are then treated as confidential.[773]

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[770] All reports from the Service in the UK are publicly available. The same counts for the reports from the Dutch Asylum and Migration Affairs Division, but not for those for those from the Country and Language Information Unit which is only for internal use.

[771] The UK considers documents older than two years to be outdated and only uses them when no recent data is available, while in the Netherlands documents are considered outdated when they no longer reflect the current situation.

[772] See ECJ Press release 70/13 belonging to 4 June 2013, *ZZ v. State Secretary for the Home Department*, App. No. C-300/11.

[773] See International Centre for Migration Policy Development, Comparative Study on

The Dutch country report on the KhAD/WAD from 2000 has been and still is a matter of dispute. The Dutch government assumes that founded on an systematic rotation system, all commissioned and non-commissioned officers of the KhAD/WAD took part in interrogating and torturing of the opponents of the communist regime whether alleged or not. The UNHCR came up with a Note based on its own research, including discussions with Dr Giustozzi, who is a leading expert on Afghanistan and the KhAD/WAD in particular, and could not confirm the rotation system. Much of the criticism on the country report relates to its sources as the public sources mentioned in the report do not contain information supporting the conclusions of the report and the anonymous sources are not made public. Several organisations have argued for quite some time for the revision of the report and recently, a motion was submitted in Parliament by two Members of Parliament which was rejected as the coalition parties stick to the correctness of the report.[774] The main reason for maintaining the report is that the authorities believe it is not possible to find reliable additional information regarding the rotation system. Though some district courts have also doubted the correctness of the report, the highest administrative court supports the report and no change regarding the KhAD/WAD policy in the Netherlands is in sight in the short term.

The UK does not have a similar problem with regard to a specific report and given its guidelines concerning the sources used for the reports: 'information that cannot be made public is not quoted', it seems that such a matter will not occur. There has been a case before the CoA in which the Dutch report on the KhAD/WAD was also relevant to the case as it was used as one of the source for the Secretary of State's decision.

In the *MH (Syria) and DS (Afghanistan) v. SSHD* case, the Secretary of State sought to exclude DS under Article 1F (a) because of the various senior positions he had held within the KhAD. On appeal to the Asylum and Immigration Tribunal by DS, the judge found that DS's asylum claim could not be excluded under clause (a) as the evidence did not establish that the KhAD had committed widespread torture or killings directed at the civilian population and that these acts did not fall under crimes against humanity to the international statutes. Further, the judge found that there was a real risk that DS would face persecution and treatment contrary to Article 3 ECHR upon return to Afghanistan. In reconsideration, the Senior Judge

Country of Origin Information Systems – Study on COI Systems in Ten European Countries and the Potential for further Improvement of COI Co-operation, Vienna 2006.

774 Motion by Members Schouw and Gesthuizen, *House of Representatives* 2013/14, 19637, No. 1886.

decided that the first Immigration Judge's decision should stand to which the Secretary of State responded with an appeal to the CoA.
The focus of the case before the First Immigration Judge was on the Secretary of State's certificate that Article 1F (a) applied by reason of DS's involvement in KhAD. The evidence relevant to that issue included a number of reports: (i) a report entitled "Afghanistan – Security Services in Communist Afghanistan (1978-1992)", published in 2001 by the Council of the European Union and referred to as "the Netherlands report";[775] (ii) a War Crimes Unit report dated 16 March 2006 which used the Netherlands report as its main source and made the recommendation on which the Secretary of State's decision was based; (iii) an expert report dated 16 September 2007 by Dr Antonio Giustozzi which was submitted on behalf of DS; (iv) a commentary by the War Crimes Unit on Dr Giustozzi's report; (v) a letter by Dr Giustozzi replying to that commentary; and (vi) a Country of Origin Information Report on Afghanistan, dated September 2007, which referred in turn to various other sources.[776]

In this case, the judge preferred the evidence given by Dr Giustozzi. She stated that: 'Dr Giustozzi was well-known to the tribunal and that his evidence had in the past been found to be independent and reliable. He was a frequent and recent visitor to Afghanistan, had written many papers and reports during his career, had given evidence and advised many courts and international bodies, and had interviewed large numbers of people in Afghanistan'.
Furthermore, the Immigration Judge referred to Dr Giustozzi's criticisms of the Netherlands report and the fact that he was supported in this by a district court in the Netherlands.[777]
According to the CoA, the Senior Immigration Judge was correct to find that there had been no material error in the Immigration Judge's decision. She was entitled to prefer the evidence of Dr Giustozzi and to conclude on the evidence as a whole that those targeted by KhAD were not civilians.

A relevant aspect regarding the assessment is the question to whom the burden of proof lies. The UK has laid down in paragraph 339J of the Immigration Rules that the assessment of an asylum, humanitarian protection or human rights claim must be carried out on an individual, objective and impartial basis, including taking into account all relevant factors. Also in the Netherlands each case is examined individually (*Individualiseringsvereiste)*. While it is up to the alien to prove that he had a well-founded fear of persecution and qualifies for protection, in case of Article 1F, the evidential burden of proof

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[775] This report was submitted by the Dutch delegation and is similar to the Dutch official report on the KhAD/WAD from 2000.
[776] See para. 54 of the judgment.
[777] See para. 57 of the judgment.

rests with the Secretary of State. In both countries, it is up to the authorities to demonstrate that there are serious reasons to believe that the person has committed one of the crimes prescribed under the exclusion clauses. The standard of proof required in criminal law does not have to be met, but the assumption has to be motivated carefully. As already explained above, the information given by the alien, in combination with the country of origin data from the 1F-unit will eventually lead to a decisive answer with respect to the investigation. When it is decided that the exclusion clauses apply, it is up to the alien in question to refute the assumption. The Netherlands uses the personal and knowing participation test to determine whether a person meets the conditions under Article 1F. The Aliens Circular prescribes that there is 'personal and knowing participation' if the person belonged to a group which the Minister has appointed having committed 1F-crimes. In such a case, the alien must prove that he is a significant exception to the rule. The KhAD/WAD is one of the groups to which the reversed burden of proof applies.[778] The practice shows that the authorities rarely accept that a person falls outside the scope of the rule due to his exceptional situation which makes one question whether it can be said that in such a case an individual examination is carried out.

The UK does not recognise a reversed burden of proof regarding specific groups which would automatically lead to exclusion. The Asylum Instruction on Exclusion states that membership of an organisation which uses violence to achieve its political or criminal objectives is not enough on its own to make a person guilty of an international crime, and is not sufficient to justify exclusion from refugee status. This also counts when a person's name is on a list of terrorist suspects or is a member of an organisation designated as terrorist. Though, this may be evidence of such involvement, the individual's membership must be examined in the context of the organisation's behaviour at the time when he was part of the group. In the authoritative case *JS (Sri Lanka)*, the Supreme Court gave factors which have to be considered when deciding on complicity, such as the nature and the size of the organisation, the position of the asylum seeker and his influence in the organisation. Once it has been established that the person committed or participated in the act; it is to be investigated whether he had the requisite understanding and intention at the time that he participated in or committed that act.[779] Thus, the key is whether the person made a knowing and significant contribution to the crime/criminal enterprise.

In both of the countries, children are not exempt from the exclusion, but

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[778] The Netherlands is the only country within the EU which recognises a reversed burden of proof regarding the KhAD/WAD. See footnote 637 for the other groups which are named besides the KhAD/WAD.

[779] With regard to these terms, the UK follows the definitions as stated in Article 30 of the Rome Statute.

the age for holding the child responsible differs. In the UK, there cannot be 'serious reasons for considering' that a child has committed an international crime if that child is under the age of ten, whereas in the Netherlands this applies to children up to the age of fifteen.
The Dutch authorities regularly publish figures with regard to the application of Article 1F which also specifies those in whose case *refoulement* plays a role. Between 1992 and 2013 around 870 aliens have been rejected under Article 1F. More specifically from 2008 on, around 180 aliens were excluded. In contrast to the Netherlands, the UK does not release numbers with regard to those who are excluded on the basis of Article 1F or the ones who are granted Restricted Leave. Based on information from the Special Cases Unit, around 50 cases a year result in exclusion under 1F.

§ 7.3 Post-exclusion phase

When it has been decided that a person is excluded from protection, a rejection of the asylum application follows which makes the person ineligible for a residence permit on asylum or subsidiary protection grounds. Contrary to the UK, in the Netherlands an excluded person cannot be considered for a regular residence permit either. Though rejection basically leads to the removal of a person, in both countries it is first checked whether on the basis of Article 3 ECHR, *refoulement* forms an obstacle for removing the alien. It is up to the excluded asylum seeker to make a reasonable case for the fear of a real risk of exposure to torture, inhuman or degrading treatment or punishment in his home country. The question that follows when the alien manages to do this, differs enormously in the two countries.

In the Netherlands, *refoulement* does not entail a right to stay in the country and the person remains under the obligation to leave the country at his own will. Though he will not be removed by the authorities as long as *refoulement* is at stake, the person is not granted a lawful residence during that period. Such a person is not entitled to any facilities and social security benefits, with the exception of entitlement related to medical necessary care, the prevention of situations that would jeopardise public health or the provision of legal assistance to the alien. In addition to the fact that an unremovable asylum seeker does not have a legal stay and is not entitled to any facilities such as the right to work, it was practice that such an alien was declared an undesirable alien, entailing the imposition of an exclusion order. The imposition of the order is done in the interest of international relations and makes the alien's residence in the Netherlands punishable pursuant to Article 197 of the Criminal Code. This leads to the awkward situation that while the alien cannot be expelled due to *refoulement*, his residence in the country is made punishable by law. The Administrative Jurisdiction Division of the Council of State judged that imposing an exclusion order on an alien who is excluded from asylum, but cannot be removed from the country due to Article 3 is not

disproportional as the interest of international relations is not less important because of Article 3 ECHR. In accordance with its discretionary powers, the Public Prosecution Service decides in each individual case whether to prosecute or not. If it does, the alien risks being put in custody or receiving a fine. An exclusion order may be lifted upon request of the alien concerned, when there are special facts and circumstances which make the alien's interest prevail over the public interest. When appealing to Article 3 ECHR for lifting an exclusion order, the alien must show that he has undertaken serious attempts to leave to another country than his country of origin and that no other country allows him admission for entrance. When the alien fails to do so, the highest administrative court finds the maintenance of the order to be correct. Since the implementation of the Returns Directive in the Netherlands in December 2011, the exclusion order has been replaced by the entry ban when it concerns aliens outside the EU, thus aliens without a lawful stay and who are considered to be a danger to public order/safety (including those to whom Article 1F is applied) are imposed with an entry ban instead of an exclusion order.[780]

In contrast to the Netherlands, an unremovable excluded asylum seeker does have a legal stay in the UK as he will receive Restricted Leave. This is granted outside the Immigration Rules and issued for a period of six months, with the option for renewal. With the RL, some or all of these restrictions concerning employment, occupation or residence place, requirement to report regularly and prohibiting the person to study at an education institution can be imposed. When the alien is not able to work, he has recourse to public funds, but only when he can show to be destitute.[781] A failure to comply with a condition may lead to prosecution. Restricted Leave is the substitute for Discretionary Leave which was issued until 2011. In the Afghan hijackers' case, the excluded men could not be removed to Afghanistan due to *refoulement,* but were not granted Discretionary Leave, which was the applicable policy at that moment. The High Court as well the Court of Appeal expressed that this was unlawful and that the government had to stick to its own policy. Those who were granted Discretionary Leave had no conditions attached to the leave and were free to work, travel, receive public funds/taxes and eventually claim settlement. That these aliens were actually free to do as they liked, while they were denied protection because of excludable acts, was found to be inconsistent by the authorities and led to action. In 2008, the Special Immigration Status was introduced but has not

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[780] See Chapter 5 for more on the entry ban.

[781] A person is deemed to appear to be destitute if a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living conditions are met) or b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs (section 95 IAA 1999).

yet entered into force. Thus, from 2 September 2011 on, all cases excluded from the protection of the Refugee Convention by virtue of Article 1F but who cannot be immediately removed from the UK due to Article 3 of the ECHR are subject to the tighter Restricted Leave policy.

In the Netherlands as well in the UK, a stay of ten-years leads to an important moment. The UK provides excluded asylum seekers who were issued Restricted Leave the option of indefinite leave after a lawful stay of ten years. The requirements laid down in paragraph 276B IR have to be fulfilled in order to qualify. Among these requirements is also stated that having regard to the public interest, there must be no reason which makes it undesirable to grant the applicant settlement. In this context, the personal history of the alien is one of the factors to be taken into account. Personal history goes beyond criminal convictions and allows considering whether the applicant's activities in the UK or abroad makes it undesirable to grant indefinite leave. In case of a 1F applicant, the alleged acts which led to exclusion will play an important role resulting in a decision against him. As stated in the Asylum Policy Instruction on Restricted Leave, only in exceptional circumstances such an alien will be eligible for settlement. In case of such a rejection, the alien will continue to be issued Restricted Leave for six months at a time if there is no change in the circumstances which lead to another outcome.
The 'no removal, no admission situation' concerning excluded asylum seekers who cannot be removed in the Netherlands has far-reaching consequences. The alien who cannot claim any entitlements has to rely on family, acquaintances or live of charity. The question is how long this ought to last for this group. Though the principle in Dutch policy is that no residence permits will be issued to those who are excluded, an exception can be made for those who succeed through the durability and proportionality-test. This test has been developed in case law by the highest administrative court and adopted in the Aliens Circular. The first step is to examine whether Article 3 ECHR offers a sustainable obstacle against removal to the country of origin and if so, whether a permanent denial of a residence title would be disproportional in the circumstances of the case. The term sustainable obstacle refers to a residence of ten years starting at the date of the first asylum application. When the alien complies with the first condition, it is up to him to convince the authorities that withholding a permit would be disproportionate. According to the Circular, disproportionality is acceptable when the alien proves to be in an exceptional situation. Until present, disproportionality has been accepted in only a few cases, which shows that it is hard to meet the criterion of special circumstances. As stated above, a ten year stay of an unremovable asylum seeker leads to an important moment: in the UK, to the question whether settlement can be obtained and in the Netherlands whether the alien can change his unlawful stay into a lawful one. As in both countries it is hard for the alien to succeed in their efforts, it often does not lead to any change in their situation.

Restricted Leave in the UK is issued for a period of six months and every six months it is assessed whether the *refoulement* obstacle still exists. In the Netherlands a regular check is made to see whether it is safe for the alien to return to his country of origin. If Article 3 ECHR would cease to exist for an excluded asylum seeker, the person is in principle removable to his country of origin. In the UK it means in concrete that the alien's Restricted Leave will not be renewed. The decision to remove the alien allows the authorities to detain the person until the removal is actually carried out. In the Netherlands, aliens' detention may only be used if there is good reason to assume that the alien withdraws from government supervision during the departure procedure and if there is an actual chance of departure. A maximum period of six months of detention is applied with the option for an extension of another twelve months as is implemented from the Returns Directive. The UK is not bound by this Directive and does not have a statutory time limit for aliens' detention. Still, the authorities are bound by the so-called *Hardial Singh* principles as developed in case law and both countries have to respect Article 5 ECHR on the right to liberty and security. Contrary to the Netherlands, the UK applies the rule that when there is a power to detain, there is also a power to bail.

§ 7.4 Article 8 ECHR

The Netherlands and the UK follow the rule that in case of exclusion of the main applicant, family members will also be refused protection, unless the dependant has a claim in his/her own right. If the dependants succeed in their application, they will initially be issued a temporary residence permit, after which they can qualify for settlement.
Should the dependant's individual asylum application be rejected, the UK grants leave in line with the main applicant. This means that they will fall under the Restricted Leave policy with restrictions applied at a minimum level necessary to maintain contact with them. In the Netherlands, the situation differs as such family members are also objected the contraindication of Article 1F and as a result they are not allowed a lawful stay. In 2008, a section was added to the Aliens Circular in which it is laid down that family members who have been staying in the Netherlands for a long, continuous period, will not be remonstrated with Article 1F if they meet three conditions: there have been resident in the Netherlands for at least ten years, from the first asylum application on; the mentioned residency must be for a continuous period and, the process of expulsion should not have been frustrated by the person concerned.

Article 8 ECHR relates to several aspects, but when it is considered within the context of Article 1F of the Refugee Convention, the right to family life is of particular importance, especially when a measure is taken that would lead to separation of the excluded asylum seeker and his family. An

unremovable1F applicant does not have a lawful stay in the Netherlands and Article 8 ECHR is often invoked to regularise his stay. In these cases, the excluded asylum seeker refers to the fact that he is being withheld from a lawful stay for a long period of time and therefore cannot maintain family life with his dependants who are legally residing in the country. According to the Administrative Jurisdiction Division, the continuance of an unlawful stay after an unlawful stay of already ten years does not violate Article 8 ECHR as the unremovable alien can actually live in the Netherlands with his legally residing family. The jurisprudence of the highest administrative court confirms the policy regarding Article 8 ECHR which is that in 1F cases the alien will not be issued a residence permit: the interests of public order outweighs the interests of family life. Up till now, no excluded asylum seeker has succeeded in winning an Article 8 ECHR claim.

Though the UK does not explicitly state beforehand that a claim to family or private life will fail for those who are excluded under Article 1F, it will be hard for the alien to succeed in meeting the stricter requirements that count from July 2012 on, as set in paragraph 276ADE (right to private life) and Appendix FM (right to family life). In both situations, the applicant must be suitable and eligible. One of the suitability grounds is that 'the presence of the applicant is not conducive to the public good'. This refusal ground is almost similar to the public interest ground under the ten years rule and may lead to difficulties in the application. Additionally, private life can only be appealed to after twenty years of residence and those who are issued Restricted Leave are not eligible for the right to family life because the applicant must not be in the UK with valid leave granted for a period of six months or less. There is an exception to the latter. When the excluded asylum seeker has a genuine and subsisting parental relationship with a child in the UK who is under 18 and is a British citizen or has lived in the UK continuously for seven years prior to the application and it would not be reasonable to expect the child to leave the UK or they have a genuine and subsisting relationship with a partner in the UK who is a British citizen or settled in the UK or who has been given refugee leave or humanitarian protection and there are 'insurmountable obstacles' to family life continuing outside the UK. Concerning the role of children in immigration cases it is explicitly stated in UK legislation that such decisions must be taken with regard to the need to safeguard and promote the welfare of children in the UK. The Netherlands does not recognise an explicit reference but as it is bound by the Convention on the Rights of the Child, it must act in the best interest of the child.[782] As the ECtHR reiterated in the *Jeunesse v. the Netherlands* case, 'where children are involved, their best interests must be taken into account. Whilst alone they cannot be decisive,

[782] In several provisions of the Convention on the Rights of the Child have reference to the 'best interest of the child', among which Articles 3 (1); 9 (1) (3) (4); 18 and 21.

such interests certainly must be afforded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it'.[783]

As regard to Article 8 ECHR, it is eventually the Secretary of State who will make an overall assessment and decide whose interest will outweigh the case. The Netherlands is clear about its policy as public order prevails in 1F cases. In view of the public interest ground, there is a big chance that the claim in the UK will lead to a rejection too. An unremovable asylum seeker whose claim is refused under Article 8 ECHR in the UK does not undergo the same far-reaching consequences as in the Netherlands as such a person is already issued a lawful stay under Restricted Leave. In the Netherlands, it is a way for the alien to change his unlawful stay into a legal one. The fact that the claim does not result in a change raises the question whether there is anything which could stop the dead-end situation of the unremovable alien in the Netherlands. There are formally two options for the alien in which he most likely will not succeed as it rarely happens that these claims are allowed. The first one would be to rely on the discretionary powers of the Secretary of State who can issue a permit to those who are in 'distressing circumstances', like, for example, serious medical issues, particularly when children are involved. Also in the UK, exceptional circumstances make it possible to be granted leave outside the IR. The second option is to apply the non-fault permit which may be granted to those who cannot leave the Netherlands, through no fault of their own. In order to obtain such a permit, the alien must show that the relevant mission of his country of origin or a third country does not provide him with documents to return. It can be concluded from the foregoing that it is impossible for an excluded asylum seeker to obtain a lawful stay in the Netherlands. This was also the case in the situation of Mr Naibzay who sought a solution outside the Netherlands. In 2013, it became known that this man, an excluded Afghan ex-KhAD/WAD, who already had an unlawful stay of fifteen years in the Netherlands, moved to Belgium following his dependants and received a residence permit for five years. The basis for the permit lies in Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. The fact that Mr Naibzay was never prosecuted for the acts which made him fall under 1F and Belgium does not adhere to KhAD/WAD policy of the Netherlands made it possible for him to receive a lawful stay in Belgium.

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[783] ECtHR *Jeunesse v. the Netherlands*, 3 October 2014, App. No. 12738/10, para. 109 (NJ 2015/130 includes annotation from B.E.P. Myjer).

§ 7.5 Conclusion

As stated at the beginning of this chapter, both countries have a very clear common goal which is that 'they do not want to provide a safe haven for war criminals or those who commit crimes against humanity'. However, the way this goal ought to be achieved shows with regard to Article 1F and several aspects related to the application of the exclusion clauses, that there are more differences than similarities. To start with the assessment phase, in the Netherlands, an asylum application is first tested against Article 1F instead of Article 1A of the Refugee Convention, the so-called 'exclusion before inclusion', while the UK formally applies 'inclusion before exclusion'. Both countries make use of country reports which are considered before a decision is taken on an asylum application. In the UK, all source documents are made public as information that cannot be made public is not quoted. This is different in the Netherlands, where the authorities make use of confidential information in reports. The latter happened when writing an official report on the KhAD/WAD, which led to much critique. As a result of the report, all former commissioned and non-commissioned officers of the KhAD/WAD are assumed to have personal and knowing participation in this organisation. It is up to the alien to be prove to be an exception which is not easy.
The UK does not recognise a reversed burden of proof regarding specific groups which would automatically lead to exclusion: though membership of an organisation which uses violence to achieve its political or criminal objectives may be evidence of involvement, is not enough on its own to make a person guilty of an international crime and is not sufficient to justify exclusion from refugee status.

The decision to refuse an asylum application on the basis of Article 1F, in both countries, leads to checking whether Article 3 ECHR forms an obstacle for removing the alien to his country of origin. If so, this means that in the Netherlands the alien will not be removed by the authorities, but on the other hand, he will not be granted a lawful residence either. The person is not entitled to any benefits and moreover, he is imposed with an exclusion order which makes his stay in the Netherlands punishable. After a stay of ten years it is assessed whether continuing to withhold a permit would be disproportionate. It is hard for an alien to succeed in their efforts and it often does not lead to any change in their situation. The same counts with regard to a claim under Article 8 ECHR as the principle in Dutch policy is that the interests of public order outweigh the interests of family life. It is no exaggeration to state that an unremovable excluded asylum seeker lives in a hopeless situation in the Netherlands as the paths for a lawful stay are blocked. The main difference with the UK is that when *refoulement* is at stake in case of a 1F applicant, a perspective is offered to the excluded alien, as such a situation does lead to a lawful stay. Though Restricted Leave is issued

for a period of six months at a time, it does give the person the chance to live a 'normal' life. The Court of Appeal played an important role in this policy as it prohibited temporary admission (in other words a no removal, no admission) with regard to unremovable excluded asylum seekers. The highest administrative court in the Netherlands did not prohibit such a situation but introduced the durability and proportionality-test to minimize the group of aliens who live in limbo. In addition, the court often supports the government's policy concerning 1F. The times that lower courts have doubted the correctness of the official report on the KhAD/WAD, the highest court set aside those judgments and supported the government's policy. This is also the case for the reversed burden of proof and the imposition of an exclusion order. Though an unremovable 1F applicant can obtain a lawful stay in the UK, it is not easy to qualify for settlement. The main rule is that the 1F applicant should return to his country of origin when possible and as in case of settlement, also with respect to Article 8 ECHR, the public interest ground will be an impediment for a positive result of the claim.

Chapter 8 Synthesis

§ 8.1 Introduction

The last chapter of this study is a summary of the foregoing and provides an answer to the central question of this research, which reads:

Which solutions can be formulated on a national and European level to deal with the dilemmas surrounding 1F applicants who cannot be removed?

At the beginning of the Introduction, I described the case of Mr X which is a good starting point to explain the layout of this chapter which consists of two parts; namely the procedure of the application of Article 1F, in others words, the assessment and what follows after the exclusion decision, i.e. the post-exclusion phase. To recall what the case was about, a brief outline follows:

Mr X fled in 2005 from Turkey to the Netherlands where he applied for asylum. Dutch official reports from the Ministry of Foreign Affairs and the General Intelligence and Security Service show that the applicant had been involved in violent activities within the Kurdish Hezbollah and after applying the so-called 'personal participation and knowing, test, the authorities decided to reject Mr X's asylum application under Article 1F. The objection under Article 1F also means that Mr X is not entitled to another form of legal residence in the Netherlands, even when Article 3 ECHR forms an obstacle for removal.

As stated above, the first part of this conclusion will deal with the application of Article 1F. Important aspects in the assessment are, *inter alia*, the required standard of proof and the question concerning the burden of proof in order to exclude a person. The standard of proof used in Article 1F is 'serious reasons for considering' which is not known in other areas of law. The Refugee Convention does not state what is meant by serious reasons for considering, yet it is clear that the standard of proof is less than the one required in criminal proceedings. The authoritative, but non-binding UNHCR documents which are discussed in Chapter 2, provide guidance to states but do not ensure that countries interpret terms in the same way. The same is true for the Qualification Directive which includes the exclusion clauses. This asylum Directive and several Directives as are dealt with in Chapter 3 have been adopted within the framework of a common asylum procedure within Europe. Though the EU Member States have included the exclusion clauses in their national legislation, it does not mean that they apply these in the same way. This is where Chapters 5 and 6, on the Netherlands

and respectively, the UK become interesting. If we return to Mr X, it is very well possible that if he had fled to the UK instead of the Netherlands, he would not have been excluded from protection and issued with a permit as, contrary to the Netherlands, the UK does not use the personal participation and knowing test.

All in all, the fact that the three grounds for exclusion under 1F are subject to interpretation and the competence to decide whether an alien is to be excluded lies with the state in whose territory he seeks protection, leads to different practices within the EU. The main question to be solved in the discussion of the first part of this chapter is whether and how a general standard for assessment can be reached within the EU. In this discussion, particular attention will be paid to the group of ex-KhAD/WAD members in the Netherlands to whom a reversed burden of proof is applied under Article 1F.

The second part of this chapter will focus on the post-exclusion phase concerning those excluded aliens who cannot be removed due to *refoulement*. Exclusion under Article 1F makes an alien ineligible for a status as laid down in the Refugee Convention and Qualification Directive, but does not mean that another kind of protection cannot be provided to these aliens. The ECHR which is discussed in Chapter 4 contains relevant provisions within this context of which Article 3 is especially of importance. This *non-refoulement* stipulation prevents the alien from being removed to a country where he fears for his life but does not say anything about the residency of this person in the host country. This means that as in the case of the application of exclusion, states are again free to decide whether they wish to provide excluded non-removable persons with a status or no status at all. In the situation of Mr X the application of the exclusion clauses means that he was not provided with a refugee status, but as the Netherlands does not provide a legal status to any excluded asylum seekers, it leads to an unlawful stay without any perspective and with far-reaching consequences for the person concerned. If Mr X had fled to the UK, he would have been issued Restricted Leave under which he is entitled to a lawful stay in the UK and may claim certain rights. It was as far back as in 2001 that the EC called for a solution at European level on the issue of excluded non-removable persons, but the comparison between the two EU countries in this study shows how awful the differences are. In this chapter, I will, among others, deal with the Dutch practice and question whether it is sustainable to maintain such disparities within the EU. Besides recommendations at European level on this matter, also concluding remarks on the Netherlands and the UK will be provided.

§ 8.2 Application of Article 1F

§ 8.2.1 Standard of proof and individual assessment

The Refugee Convention was created to provide protection for those who were forced to leave their countries and fall under the definition of a refugee. Being a post-Second World War instrument, the memories of the war were very much alive during the drafting of the treaty, In addition to the Convention's main goal of safeguarding those in need, states also agreed that war criminals should not be protected, which eventually led to the insertion of Article 1F. The Ad Hoc Committee proposed to use the words 'The High Contracting Parties shall be under no obligation to apply the terms of this Convention' to those to whom Article 1F can be applied. However, in order to make sure that notorious war criminals would not be considered as a refugee, the present wording of 'The provisions of the Convention shall not apply' was adopted. Thus, when there are serious reasons to believe that a person falls under 1F, the country assessing the asylum claim will not issue a refugee status to that person. The last point is clear, but determining when there are 'serious reasons' is more problematic. As Grahl-Madsen states:

'There may be honest doubt as to whether 'serious reasons' exist in any particular case. A person may therefore be considered to fall under the provisions of Article 1F in one country but not in another. However, extreme cases apart, the recognition of a person as a refugee will hardly cause any dispute between states. And after all, 'it was the notorious cases which the drafters of the Convention had in mind'.[784]

Neither the *travaux preparatoires* nor the Convention itself give any guidance to the question how the phrase 'serious reasons for considering' should be interpreted. Additionally, the absence of an international refugee court to adjudicate on the interpretation of the Convention also contributes to the lack of a single valid interpretation of the Convention. The UNHCR documents on the Refugee Convention and the exclusion clauses in particular provide the countries with basic guidelines. The UNHCR Handbook states that it is not necessary for an applicant to have been convicted of the criminal offence, nor the criminal standard of proof has to be met[785] and this is followed by the majority of states.[786] However, indictments or arrest warrants put together by international criminal tribunals would, according to the UNHCR, satisfy the standard of proof and give rise to exclusion.[787] This has to do with the

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784 Grahl-Madsen 1966, p. 263.

785 Guidelines on exclusion, para. 35.

786 Rikhof 2012, pp. 110-114.

787 This is different when an indictment is set up by another country. In such cases, accurate country of origin information is to be examined in order to for example

fact that an international indictment or arrest warrant is put together in a more rigorous manner when compared to the evidence used for exclusion in RSD procedures. As the criminal standard of proof does not have to be met, the question remains, what is sufficient evidence for exclusion. In the first place clear and credible evidence which leads to a substantial suspicion is required: simple suspicions are not enough. A confession by the applicant and testimonies of witnesses count as satisfactory evidence if they are reliable. Thus, it is relevant to assess the relevant country's compliance with international standards on criminal justice. The fact that an applicant does not want to cooperate, does not itself prove guilt when there is no clear and credible evidence available. With regard to other sources the Handbook lays down that exclusion should not be based on evidence which cannot be challenged by the applicant concerned. As an exception, reliance on anonymous evidence where the source is kept secret if possible where 'this is absolutely necessary to protect the safety of witnesses and the asylum seeker's ability to challenge the substance of the evidence is not substantially prejudiced'. When it is a case of concealing the source because of national security interests, these interests may be protected by introducing procedural safeguards which also respect the asylum seeker's due process rights.[788]

Along with the standard of proof concerning exclusion there is also the question on whom the burden of proof rests. Article 4 (1) of the recast Qualification Directive prescribes that Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member States to assess the relevant elements of the application. Furthermore, the assessment has to be carried out on an individual basis.[789] According to the UNHCR, to exclude a person, individual responsibility must be established in relation to an act which falls under Article 1F, which has to be proven by the authorities. Thus:

'Individual responsibility flows from the person having committed, or made a substantial contribution to the commission of the criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct. The individual need not physically have committed the criminal act in question. Instigating, aiding and abetting and participating in a joint criminal enterprise can suffice. The fact that a person was at some point a senior member of a repressive government or a member of an organisation involved in unlawful violence does not in itself entail individual liability for excludable acts'.[790]

check whether a confession made in a criminal investigation is reliable.

788 UNHCR Handbook, Part 1, para. 113.

789 Article 4 (3) recast Qualification Directive.

790 'UNHCR Guidelines on International Protection: Application of the Exclusion

With respect to the last sentence, a distinction should be drawn between mere membership of an organisation which engages in international crimes and actual complicity.[791] During the Nuremberg trials, the International Military Tribunal accepted that mere membership was not sufficient to establish liability.[792] However, according to the UNHCR a presumption of responsibility may arise 'where the individual has remained a member of a government clearly engaged in activities that fall within the scope of Article 1F. Moreover, the purposes, activities and methods of some groups are of a particularly violent nature, with the result that voluntary membership thereof may also raise a presumption of individual responsibility. Caution must be exercised when such a presumption of responsibility arises, to consider issues including the actual activities of the group, its organisational structure, the individual's position in it, and his or her ability to influence significantly its activities, as well as the possible fragmentation of the group'.

In the UNHCR's view and endorsed by the ECJ, exclusion is also not automatically justified when an individual is associated with a terrorist organisation which is on an international list.[793] However, again a presumption of individual responsibility may arise when the person can reasonably be considered to be individually involved in violent crimes.[794] In each case, the degree of involvement of the person concerned has to be carefully assessed. The consequence of a presumption of responsibility is that it is assumed that the person falls under 1F and therefore has the possibility to refute the presumption.

§ 8.2.2 European harmonisation?

As discussed in Chapter 3, it was in 1999 that the European Council decided in Tampere to work towards 'a CEAS within the EU, which is based on the full and inclusive application of the Refugee Convention'. By creating uniformity, the EU wants to contest the diversity in national asylum systems and practices among states which is seen as one of the main

Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees', HCR/GIP/03/05, 4 September 2003, paras. 18-19.

791 In the Canadian jurisprudence, the personal knowing and participation test is developed in order to assess whether individual responsibility exists. In the *Valere v. Canada (Minister of Citizenship and Immigration)* case, 2005 FC 524, 19 April 2015 the Canadian court recalled the principles regarding participation which are required in order to establish complicity. See Goodwin-Gill 2008, p. 170. After *Ezokola v. Canada (Minister of Citizenship and Immigration)* 2013 SCC 40SC, 19 July 2013 the Canadian authorities replaced the personal and knowing participation test by the contribution-based test.

792 Goodwin-Gill 2008, p. 168.

793 See § 3.4.1 of this study.

794 See § 2.6.2 of this study.

reasons for asylum flows within Europe. Thus, the notion is that a common standard in the EU will ensure that one Member State is not perceived as a more attractive destination than another. In order to realise the set goal, several legislative measures have been adopted, including the Qualification Directive. This instrument is seen as the most important one as it deals with the substantive asylum law of Europe. The initial Directive was adopted in 2004 with a deadline for implementation in the Member States on 10 October 2006. The Directive prescribes who falls under refugee protection and the rights that flow from a refugee status. It also establishes a status for extra Convention refugees (subsidiary protection) which is to be seen as additional protection to the refugee protection as laid down in the Refugee Convention. Furthermore, the Directive contains provisions regarding exclusion which is relevant within the scope of this study.[795] The evaluation of the Directive's implementation among states enabled the Commission to conclude that a higher degree of harmonisation was necessary to obtain a common asylum procedure. This led to the amendment of the Qualification Directive. In 2011, the recast Directive was adopted and is now in force. The distinction between refugee and subsidiary protection status in several provisions has been deleted and changed into beneficiaries of international protection. This does not count for the provisions concerning exclusion. Thus, an asylum seeker who falls under the terms of the exclusion provisions of Articles 12 and 17 does not receive a refugee status or subsidiary protection. However, the recast Qualification Directive does not prohibit allowing an excluded asylum seeker a permit on any other ground: this is left to the discretion of states. Pursuant to Article 21 (1), states must respect the *non-refoulement* principle in accordance with their international obligations. Where not prohibited by these international obligations, Member States may *refoule* a refugee, whether formally recognised or not, when:

(a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or (b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.

Now that Article 1F has entered into the Directive which is transposed into national legislations in Member States, it raises the point what this means for its application in practice. Are exclusion cases treated alike in Member States? This is a relevant question within the framework of a CEAS as the main goal of a common system is to remove diverse practices between European countries. The response to the above question is negative and the outcome of the comparison between the Netherlands and the UK in Chapter 7 is

[795] See § 3.3.3.1 - § 3.3.3.4 for a discussion of these provisions.

a prime example of this situation.[796] Both countries treat sources underlying the authorities' decisions on exclusion differently and use different tests regarding the assessment of evidence. There is also a marked difference between them because the UK does not recognise a reversed burden of proof regarding specific groups which would automatically lead to exclusion, whereas the Netherlands is at a loss with the aftermath of the exclusion of a group of ex-KhAD/WAD members. I will deal with the latter in more detail in the following paragraph.

Including the exclusion clauses in EU legislation is not sufficient to reach uniformity between states. The fact that this legislation goes further than the Refugee Convention regarding exclusion as additional grounds to Article 1F have been laid down and revocation clauses[797] have been introduced, does not contribute to the alignment of countries' practices either.[798] This means, in concrete, that for the interpretation of the terms of the clauses as laid down in Articles 12 and 17 of the recast Qualification Directive, countries are still dependent on non-binding UNHCR documents which were also available to countries before the adoption of the EU Directive. As explained earlier, the Tampere Conclusions as well as the other relevant asylum Directives state that a common asylum system should be based on the full and inclusive application of the Refugee Convention, which implies a role for the UNHCR. Close cooperation with the UNHCR is also recognised in recital 22 of this recast Directive which states that consultations with the UNHCR may provide valuable guidance for Member States when determining refugee status.

§ 8.2.2.1 The Dutch practice with regard to the KhAD/WAD

As an exclusion assessment takes place during the Refugee Status Determination procedure, countries must respect Article 10 of the recast Asylum Procedures Directive which sets forth requirements for the examination of an asylum application.[799] This provision states, among others that applications are examined and decisions are taken individually,

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[796] See also UNHCR Asylum in the European Union. A study on the implementation of the Qualification Directive, Brussels November 2007.

[797] See Articles 14 and 19 of the recast Qualification Directive.

[798] Here I refer, *inter alia*, to Article 12 (3) of the recast Qualification Directive in which is laid down that exclusion of a refugee status applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein and a copy of the text of Article 33 (2) of the Refugee Convention in Article 17 (d) of the recast Qualification Directive which states that a third country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that he or she constitutes a danger to the community or to the security of the Member State in which he or she is present. See § 3.5 for more on the enlargement of the clauses.

[799] See also Article 4 (3) recast Qualification Directive.

objectively, impartially and that precise and up-to-date information is obtained from various sources, such as the European Asylum Support Office (EASO) and UNHCR and relevant international human rights organisations, as to the general situation prevailing in the countries of origin of applicants and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions.[800] This corresponds to the UNHCR's line of thought as the basic principle is that assessing an asylum application as well as determining on exclusion from asylum should be based on individual responsibility. This particular aspect is one of the issues under discussion in the Netherlands concerning the group of ex-KhAD/WAD members. The following is a short summary: an influx of Afghan asylum seekers in the 1990s and rumours that there were members of the Afghan KhAD/WAD intelligence service among them led to action by the Dutch authorities. In 2000, an official report was issued regarding this group in which the conclusion read: 'all non-commissioned officers and officers were active in the macabre divisions of the KhAD/WAD and were personally involved in the arrest, interrogation and sometimes execution of suspected persons. A rotation system ensured that operatives changed divisions frequently. A promotion or placement in a division or board with a more administrative or technical character was only attainable for those who sufficiently proved their mettle during the first placement (s)'. On the basis of this reports results, the burden of proof was reversed which means that all former non-commissioned officers and officers of the KhAD/WAD are assumed to have personally and knowingly participated, unless they can prove to be a significant exception.

In 2008 the UNHCR came with its own Note on the matter in which it could not confirm that there had been a systematic rotation system within the KhAD/WAD. This result made several organisations, mayors of various Dutch municipalities and lower courts doubt the correctness of the official report and criticise its sources. Some points of critique concern the fact that the report's conclusions relate to 'all' non-commissioned officers and officers which is very absolute and cannot be confirmed. That it is based on anonymous sources which are not made public and on the fact that the Netherlands could not enter Afghanistan at the time the report was drawn up and used communications from the Dutch Embassy in Pakistan. Moreover, as it is extremely difficult for an excluded Afghan to prove to be an exception, it makes one question whether an individual examination is carried out.[801]

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[800] See Article 10 (3) (a) and (b).

[801] Such an exception can be accepted when the following three cumulative conditions are met: 1) the alien joined the KhAD/WAD as a lateral-entry officer which makes it plausible that he did not complete the officers' training; 2) the alien did not rotate

Though the Dutch report and its practice is still subject to critique, it is still currently in use and supported by the highest administrative court. The Dutch authorities insist on its correctness and stand by their opinion that individual examination is carried out.[802]

§ 8.2.2.2 The Dutch practice in EU context

The Dutch legislation regarding the exclusion clauses is no different to that of other EU countries as it is based on Article 1F of the Refugee Convention and the implementation of the recast Qualification Directive. Yet, the results of a SCIFA questionnaire on Article 1F which is distributed among EU Member States shows that the Netherlands implements a more proactive 1F-policy within Europe because most of the other EU countries rarely apply the exclusion clauses. The reason for the Netherlands' active position is because it does not want to be a safe haven for war criminals and it wants to uphold its obligations in the interest of international relations. Besides the Netherlands being at the forefront of applying the exclusion clauses on asylum seekers, it is also the only country within Europe that acknowledges the categorical exclusion of ex-KhAD/WAD members. This is based on the personal and knowing participation test and, in particular, the following text which is included in the Aliens Circular: 'knowing participation is present when the alien was employed in an organisation of which the Minister has determined that certain categories of persons belonging to that organisation fall under Article 1F unless he can prove that there was a significant exception in his individual case. Personal participation is present when the alien has belonged to a category of persons within an organisation, of which the Minister has determined that certain categories of persons belonging to that organisation will be considered to fall within Article 1F unless he can prove that there was a significant exception in his individual case'.[803]
Though the UNHCR confirms the possibility of a reversed burden of proof in certain cases, the basic principle is still that each case should be examined individually. This means that even these cases should be considered with care and all relevant circumstances have to be examined before excluding a person. The ECJ clarified this issue by stating that mere membership of a criminal/terrorist organisation does not automatically mean that the person must be excluded: this is conditional on an assessment on a case-by-case basis of the specific facts.[804]

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within the organisation and 3) the alien was not promoted during the term of service. In practice, the person to whom Article 1F is applied is hard-pressed to meet the conditions as it rarely happens that an ex-KhAD member falls outside the scope of Article 1F due to his exceptional situation.

802 See Chapter 5 for more on the Netherlands.

803 See Wijngaarden 2008.

804 ECJ 9 November 2010, *Bundesrepublik Deutschland v. B & D* case, App. Nos. C-57/09 and C-101/09, para. 99.

The fact that the Netherlands stands alone within the EU regarding the reversed burden of proof on the KhAD/WAD group does not mean the country is not allowed to do so. In the end, the highest court supports its policy and no other court at European level has ruled against the country's practice concerning the matter. Yet, it is interesting to question how this situation is to be seen within the framework of working towards a common standard within Europe.The EU wants to oppose the diversity in national asylum practices among states which is seen as one of the main reasons for asylum flows to Europe. This way, more uniformity would be favourable to European countries, but let's reverse the situation. The EU also wants to be an area in which people who need protection feel safe and are treated fairly. Is it defendable that there is a big chance that an asylum seeker who was excluded in the Netherlands on the basis of a questionable report, with all the consequences that it entails, probably would not have been excluded if he had applied for asylum in another EU country?

The Netherlands has often repeated that it follows an active 1F approach as it does not want to be a safe haven for war criminals and that it does so in the interest of international relations. It seems to me that the one thing all EU countries have in common is that they do not want to provide a safe haven for war criminals, so the Netherlands is not unique in its approach. Howshould this standpoint on international relations be interpreted, if one places it in the following perspective?

In Chapter 5 regarding the Netherlands, I described the situation of an excluded asylum seeker who received a lot of media attention because of a dispute between a mayor and the former Minister for Immigration and Asylum.[805] The man in question, Mr Naibzay, was excluded on the basis of the official KhAD/WAD report and was not allowed to remain legally in the Netherlands, but his spouse and four children had received a residence permit and were already naturalised Dutch citizens. When the Minister wanted Mr Naibzay to be expelled to Afghanistan, the mayor of the municipality of Giessenlanden where Mr Naibzay was residing with his family, drew attention to his situation and criticised the fact that it was practically impossible for Mr Naibzay to prove his innocence due to the fact that none of the evidence would suffice. Though he was not removed to his home country, there were no prospects for any change in his status in the Netherlands. This situation forced him look for a solution elsewhere. In 2013, after a stay of over fifteen years in the Netherlands, he followed his family members and moved to Belgium where he received a residence permit for five-years. The basis for this permit lies in Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside

[805] See § 5.3.2.4.

freely within the territory of the Member States. The fact that Mr Naibzay was never prosecuted for the acts which made him fall under 1F and Belgium does not recognise the KhAD/WAD policy of the Netherlands made it possible for him to legally reside in Belgium.[806]

I think that the case of Naibzay is a good example of what the EU wants to avoid with regard to excluded asylum seekers as it leads to a situation which is hard to explain within the context of international relations and uniformity within Europe: is Belgium not bound by the same Refugee Convention and asylum Directives? Solely on the basis of the asylum Directives and the recast Qualification Directive in particular, which includes substantive asylum law, there will be no change in the current situation as it is simply not enough to induce countries to carry out the same measures. In the following paragraph I will discuss which steps I believe must be taken, within a European context, to ensure that the uniformity which is pursued, comes a step closer.

§ 8.2.3 How to reach uniformity within the EU?

It is no exaggeration to state that European countries face an enormous challenge when it concerns managing migration flows, in particular with regard to the high influx of Syrian asylum applicants, due to the ongoing conflict in Syria. It requires the necessary care from states to select those who are undeserving and to provide rights and entitlements to aliens who are in need of protection.[807] As Foster states: 'the overwhelming purpose of the Refugee Convention is in the end a human rights one. In essence, the treaty provides for refugees' rights and entitlements under international law'.[808] Though this Convention is seen as a living instrument which means it has to be interpreted and applied within the framework of current conditions,[809] one main aspect should never be in dispute concerning the application of Article 1F, which is that 'it was the notorious cases which the drafters of the Convention had in mind'.[810]

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806 The case of Naibzay is not an exception as there more cases known about asylum seekers who have been excluded in the Netherlands and who have managed to get a permit in another EU country. See also Reijven & Van Wijk 2014, pp. 265-266.

807 At the end of 2014 a questionnaire is circulated within the framework of the European Migration Network in order to get an impression about the findings of EU Member States with regard to the applicability of article 1F Refugee Convention in Syrian cases in which 13 out of the 16 responding countries reported to have active efforts to detect article 1F (exclusion) indications in Syrian cases. See also Bolhuis & Van Wijk 2015 for more on the situation in the Netherlands.

808 McAdam 2011, p. 92.

809 Idem, pp. 103-104.

810 Grahl-Madsen 1966, p. 263.

The European Commission states on its website that:[811]

'Asylum must not be a lottery. EU Member States have a shared responsibility to welcome asylum seekers in a dignified manner, ensuring they are treated fairly and that their case is examined to uniform standards so that, no matter where an applicant applies, the outcome will be similar'.

Though this is a noble ambition and the EU is working hard to achieve a common asylum system, the current practice dealing with asylum claims, including the exclusion of those who fall under Article 1F, renders little results, let alone a similar outcome. I believe that it is much more important to create uniformity in dealing with claims is than to achieve the same outcome at all costs. This is in any case a difficult task as long as for the application of Article 1F, the standard of proof of 'serious reasons for considering' is in use. As already discussed, neither the Convention itself, nor the *travaux preparatoires* provide further guidance to what 'serious reasons for considering' really means. States agree that no criminal standard of proof has to be met and the UNHCR Handbook explains that these serious reasons should be based on clear and credible evidence. In addition to what is stated in the UNHCR documents, I recommend to also include a provision on the assessment of exclusion in the recast Asylum Procedures Directives. Though Article 10 of this Directive, which also relates to exclusion, sets forth requirements for the examination of an asylum application, it would be wise to insert a specific provision in this Directive on the requirements of the standard of proof concerning exclusion. The adopted asylum Directives which are implemented in the Member States' national legislations is an essential step towards uniformity, but it is not sufficient.[812] It is clear that further steps are required to achieve an actual common practice within Europe which will lead to a fairer examination of the applications: Thus what can be done?

- *Official country reports at European level*

The asylum seeker's account of reasons for their request for asylum is an important source of evidence in the asylum application assessment. When on the basis of this information an official believes that he is dealing with a potential 1F applicant, it is the task of the authorities to find additional information to substantiate the notion. Often an official country report on the country of origin of the person in question will be decisive. States have special services which are responsible for collecting information and

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[811] <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm> (last accessed on 21 September 2015).

[812] See also Lambert 2009, pp. 519-543.

drawing up reports as also discussed in Chapters 5 and 6 regarding the case of the Netherlands and the UK. The practices concerning these reports can differ which is also the case between these two countries as shown in the comparison in Chapter 7. The UK uses embassy reports only as background information and makes all source documents public, while the Netherlands makes use of confidential information in reports. On the other hand, in the UK, administrative decisions refusing entry into national territory that are adopted on the basis of information whose disclosure would be liable to prejudice national security may be contested before the SIAC. In such proceedings, neither the person who has contested such a decision nor his own lawyers have access to the information upon which the decision was based when its disclosure would be contrary to the public interest.[813] Another difference is that the UK has an Advisory Panel on Country Information as a monitoring body of reports, whereas in the Netherlands it is up to the courts to assess in appeal cases the quality of the background reports on which the country report is based.[814] A good example of how countries may differ in drawing up and using country reports is the Dutch KhAD/WAD report of 2000. As already explained, this report has been criticised regarding, among others, its sources and it is still a matter of dispute. An extraordinary fact is that, within the EU, the Netherlands stands alone concerning the conclusions of its report which has far-reaching consequences for the alien concerned. It is an illusion to create uniformity within Europe regarding asylum systems as long as such undesirable situations occur. A close cooperation between Member States concerning country of origin information (COI) is a requisite, which is also encouraged by the EC and the UNHCR.[815]

Up to now, several steps have been taken in EU context regarding this issue. For example, the Centre for Information, Discussion and Exchange on Asylum (CIREA) was established and succeeded in 2002 by Eurasil. The EC set up the latter committee as an EU network for asylum practitioners providing a forum for the exchange of COI, best practices and a variety of policy-related matters among EU Member States, asylum adjudicators and the EC, which aimed to improve and maximize convergence on approaches to, and assessment of, the protection needs of asylum seekers. In 2006, the Commission delivered a communication to the Council and Parliament on strengthened practical cooperation, including the exchange of COI and called for the creation of a common portal which would be an easily accessible common entry point for existing information; propose guidelines

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[813] See § 6.4 for a discussion of the ECJ 4 June 2013, *ZZ v. SSHD* case which concerned the non-disclosure of information in proceedings before the SIAC.

[814] See § 7.2 for more on this.

[815] See UNHCR Country of Origin Information: Towards Enhanced International Cooperation, Geneva February 2004.

on the production of COI and on the longer term the development of a fully-fledged EU COI database containing information based on EU common principles should be envisaged.[816] What was already suggested with the start of the Hague Programme, eventually led to the creation of the EASO which has taken over responsibility for Eurasil. Since February 2011, EASO acts as a centre of expertise on asylum providing support to Member States in order to develop a CEAS. COI is responsible for gathering and sharing information, but moreover, one of its tasks is to write and publish its own reports (the EASO COI report). Experts of the European COI units come from Member States on a voluntary basis and are involved in the production of COI reports on countries and topics defined by EASO.[817] EASO primarily focuses its COI-related activities on countries which have been identified using an internal 'country determination methodology', which is based on a combination of statistical indicators (including number of applicants, number of affected Member States, number of pending cases, etc.) and qualitative information provided by senior Member State experts.[818] To date, EASO has issued reports on Chechnya, Somalia, Eritrea, Pakistan and three on Afghanistan.

The establishment of EASO is a substantial improvement within the framework of founding one asylum system within Europe, but I do not believe its current activities regarding COI can prevent future examples like the KhAD/WAD report as outlined above. This has to do with the fact that EASO-COI reports lack binding force. Thus, national services continue to draw up their own reports of which the content concerning to the country in question may differ from the EASO conclusions. Though states are entitled to do so and will not be very keen on giving up their freedom, the EU needs binding European COI reports in order to get common assessments concerning the situation in countries of origin. The binding effect upon states does not have to cover all reports which are issued by EASO, but when the EU is exposed to an inflow of asylum seekers from certain countries that are contending with problems or organisations known to be notorious, all Member States must use the same information from European reports.

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816 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0067&from=NL> (last accessed on 21 September 2015).

817 The EASO COI report is drawn up conform the methodology as drafted by a working party in 2011 with the participation of EASO and the representatives of Country of Origin Information units
Working for, *inter alia*, Staatendokumentation, Bundesasylamt - Austria; Dokumentations- og Projektkontoret, Udlændingestyrelsen - Denmark and Lifos, Migrationsverket - Sweden.
The methodology is based on the 'Common EU guidelines for processing COI' as well as on the 'EU common guidelines for (joint) fact finding missions'.

818 Information provided by EASO by means of e-mail on the 1st of April 2015.

The determination of the countries and organisations selection must not be limited to the EASO as is currently the case. When an EU Member State makes an early observation that there is need for a joint report, this must be noted and action taken. As stated above, staff members at the EASO COI units consist of country experts from Member States. The current practice is that about three or four EU countries are responsible for writing the COI report, to which sometimes supportive research is delivered by representatives from other countries and the report is reviewed by experts from again different EU States.[819] The cooperation between EU countries and their rotation as authors of the reports is a good way of raising mutual trust between states and creating a learning environment. This also counts for the involvement of UNHCR as a reviewing party. However, the voluntary character of contributing to the reports constitutes the risk that it will always involve the same countries, while it is necessary that also inexperienced Member States build up expertise. This is why I propose a mandatory contribution by countries in which the senior Member States play an important consultancy and advisory role. In view of EASO's limited research capacity and its dependence on Member States, I think it would be an improvement if EASO's expertise concerning country of origin information is enlarged by working in close collaboration with Council of Europe institutions. Besides paying attention to judgments of the ECtHR, the CPT and the Commissioner for Human Rights they can also provide valuable information and knowledge transfer given their work experience in the human rights field. The fact that the EU has set up the Asylum, Migration and Integration Fund (AMIF) for 2014-2020 with a total of 3.1 billion euros for the period of 7 years to strengthen and develop a common Union regarding asylum and immigration, shows that Europe is ready to move forward.[820]

- *A joint decision on the reversed burden of proof*

Each asylum application has to be examined individually and to exclude a person from a refugee status, individual responsibility must also be established regarding the crime which falls under Article 1F. What this means is discussed under § 8.2.1 where it is also explained that although each case should be examined on its own merits, it is possible for authorities to reverse the burden of proof in case of membership of an organisation or government

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[819] Contrary to the other reports, the COI Report on Chechnya: Women, Marriage, Divorce and Child Custody is written by one EU Member State and reviewed by a few others.

[820] <http://ec.europa.eu/dgs/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund/index_en.htm> (last accessed on 21 September 2015).

engaged in activities that fall within the scope of 1F. The consequence of such a presumption of responsibility is that the authorities assume that the person falls under 1F. However, it is possible for the applicant to refute this presumption.
As discussed under Chapter 5 and shown under § 8.2.2.1, the policy on the ex-KhAD/WAD members in the Netherlands is based on an official report on this organisation from the Ministry of Foreign Affairs. Based on the results of the 2000 report, the burden of proof is reversed concerning all former non-commissioned officers and officers of the KhAD/WAD. Thus, these men are assumed to have personally and knowingly participated, unless they can prove themselves to be a significant exception.
The fact that the Netherlands is the only EU country which applies a reversed burden of proof on members of this organisation shows once again the importance of creating official reports at a European level. Thus, my second remark refers the previous discussion regarding country reports. I believe that such an important decision as reversing the burden of proof on certain members of a group or government must be based on a joint decision by the EU Member States. This is a role for the Commissioner for Migration and Home Affairs (who can act as a facilitator) and the Council of Ministers, in particular the Justice and Home Affairs Council. The Council comprises ministers from each Member State who are responsible for the policy area under discussion such as migration in this instance. The duties of the Council include coordinating states' policies and adopting measures in relation to Justice and Home Affairs policy. These duties are in line with reaching a possible decision on whether the burden of proof for a specific group should be reversed. Only when all states apply the same rule to the group in question, can a fair and uniform system without divergences in national implementation be achieved within Europe.[821]

§ 8.3 Post-exclusion phase

In the foregoing, attention was paid to the first phase relating to exclusion, which is the assessment and application of Article 1F. A logical sequel to this discussion is the examination of what happens to those asylum seekers who are actually excluded. The ideal situation for states is that they return to their home country, but this does not happen very often due to several reasons such as: that the person is not willing to leave; has no documents; the other authorities are not cooperating or removal would breach the *refoulement* principle.
As seen in the Introduction in Chapter 1 and the discussion in the subsequent

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[821] A positive development to mention within the scope of European cooperation and creating uniformity is EASO's pilot project named Joint Processing in which, *inter alia*, IND staff members are being exchanged for the purpose of hearing asylum seekers and deciding on claims in other EU Member States. See *IND Context*, *Tijdschrift voor relaties van de IND*, No. 1 March 2015, p. 9.

chapters, the focus of this study is on this post-exclusion phase; in particular regarding those excluded aliens who cannot be removed to their countries of origin because of *refoulement*. Within the aim of creating a CEAS it is not only important that states have a common approach to how they apply Article 1F, but also how they deal with the applicants who are excluded. The recast Qualification Directive affirms in its Preamble the principle of *non-refoulement* and prescribes under Article 21 (1) that 'Member States shall respect this principle in accordance with their international obligations'. The latter phrase refers, among others, to Article 3 ECHR in which it is laid down that, 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. Article 3 ECHR is a very relevant provision for the excluded asylum seeker within Europe as it states in absolute terms that a person cannot be removed from the host country when he fears for his life. Though this finding in this Article gives the alien a certain amount of protection, there is another side to the coin: Article 3 does not entail a right to stay. Thus, states are not expressly prescribed to issue a permit to the alien in case of *refoulement*.

Article 1F of the Refugee Convention and its equivalents in the recast Qualification Directive are mandatory provisions, which means that when one of the clauses applies to a person, he has to be excluded and is not given a refugee status as provided by the Convention, respectively international protection (standing for refugee status and subsidiary protection) as provided by the Directive. However, this situation does not mean that states are not allowed to issue permit to the alien on another ground, such as, for example on the basis of discretionary powers for humanitarian reasons. In the end, it is within the domestic domain of EU states to decide how to deal with excluded non-removable asylum seekers. The results of the comparison between the Netherlands and the UK, as explained in Chapter 7, is a good illustration how different the practices in two of the EU countries are. I will elaborate further on these countries in the following paragraphs, but to summarise it means that an excluded asylum seeker in the Netherlands cannot obtain a residence permit on any other grounds, irrespective of whether *refoulement* is at issue. Thus, also in case of *refoulement,* the alien is not granted a lawful stay. Though the person will not be removed by the authorities, he remains under the obligation to leave the country at his own will. During his stay in the country, the excluded alien is not entitled to work, use facilities or receive social security benefits, with the exception of the necessary medical care and legal assistance. Contrary to the policy in the Netherlands, the UK does provide a lawful stay to an excluded non-removable asylum seeker in the form of Restricted Leave. Such a Leave is issued for six months with the option for renewal. The alien is free to work and live where he wants, but restrictions can be imposed on him as well a requirement to regularly report himself.

§ 8.3.1 Solutions at European level

The question that raises with respect to the observation as stated above is whether such contrasts between EU countries is compatible with the aim of creating a CEAS. In my opinion, creating uniformity in Europe does not only mean that states are in line with how they apply Article 1F, but also in how they deal with the aliens who are excluded. This is an essential requisite if we want to talk about a fair system within Europe. From this perspective, it should not make a difference in which EU Member State Mr X from the case in the introduction ends up. In the current situation, his exclusion in the Netherlands offers him no perspective for a lawful stay whereas he could have lead a 'normal life if he was in the UK. Although the European Commission has been urging for a solution at European level for more than ten years, nothing has as changed so far.[822] In the following paragraphs I will discuss what I consider should be done to diminish the disparities between EU countries.

- *Mandatory provision on non-removable aliens*

I have explained that exclusion results in the ineligibility to obtain protection under the Convention, respectively recast Qualification Directive but that states are free to decide whether or not to provide another type of status to these aliens. On the other hand, it has been shown that Article 3 does not entail a right to stay in the host country. This means that when the provision applies, the excluded alien may not be removed but his situation regarding a residence permit is not certain either. The practice in the Netherlands shows that applying Articles 1F and 3 ECHR at the same time can leave such a person in limbo. Putting an alien in a position without any status is in itself undesirable, but when it concerns a person who cannot be removed due to *refoulement*, it is not only undesirable but also inexplicable. This is why I am of the opinion that in addition to Article 21 (1) of the recast Qualification Directive on respecting this principle, a clause should be inserted in the Directive which reads that excluded asylum seekers who are non-removable due to *refoulement* should not be left without a status.[823] There are a few relevant reasons why this is the case:

- The ECtHR has stated in *Chacal* and reaffirmed in the *Saadi* case that 'Article 3 enshrines one of the most fundamental values of democratic

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[822] Commission Working Document, *The relationship between safeguarding internal security and complying with international protection obligations and instruments* COM/2001/0743 final.

[823] This also counts with regard to family members who did not manage to gain protection on individual grounds. The question of extension of stay must be connected to the position of the excluded asylum seeker.

society. Though the Court is aware of the immense difficulties faced by states in modern times in protecting their communities from terrorist violence, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct'. Thus, no limitation or interferences are allowed when an alien would be subjected to *refoulement*. The mere possibility of ill-treatment on return is not enough to fall under the scope of Article 3 as a high degree of proof is required. This way, the alien must show substantial grounds that he faces a real risk of ill-treatment in the receiving country on his return and this ill-treatment must attain a minim level of severity for it to fall under the scope of the provision. When exclusion under Article 1F is not a subject under discussion and the person does not qualify as a refugee, an Article 3 obstacle would normally lead to a residence permit based on subsidiary protection. I understand that an unremovable person who is excluded from asylum is not given protection similar to someone who is not excluded, but the fact that such a person is not given any kind of legal status during his stay in the host country short-changes the significance of the *refoulement* principle. Not removing shows on the one hand that the state concerned seems to act consistent with a democracy based on the rule of law, while on the other hand, the value of Article 3 is being undermined which makes the provision meaningless. In the end, not enabling the person to stay legally is equating him to others living illegally in the country for any reason whatsoever.

- My second point relates to the standard of proof concerning exclusion in relation to leaving a non-removable alien in limbo. As discussed under § 8.2.1, Article 1F requires that there are 'serious reasons for considering' that the alien has committed a crime which would fall under one of its limbs. The phrase is unknown in other areas of law and what it actually means, it is unclear. Nevertheless, it is an established fact that the criminal standard of proof does not have to be met. In this connection it hardly occurs that the excluded alien is prosecuted, let alone gets convicted for the committed crime, which has mainly to do with the difficulty of collecting proof against the person. This observation raises the question whether the vague administrative standard of proof which is used, outweighs the situation of leaving a non-removable excluded asylum in limbo?

If one considers this question in the light of the Dutch practice, I believe it is untenable. How can one justify that an alien who has not been criminally convicted and who the authorities decided that he cannot be removed to his home country, is left in uncertainty for many years, often for a period of more than a decade. A good example of this practice is the case of Sison who has lived in the Netherlands for 25 years already but still does not have a legal stay

and yet he cannot be removed.[824] Besides the uncertainty of his predicament, he is not entitled to any social benefits.[825] If one looks at the matter from a purely legal perspective, it is defensible that exclusion from protection means an entire exclusion, but what about the moral values to which a state is bound? Boeles already expressed years ago that the *refoulement* principle should be respected and non-removable excluded asylum seekers should be protected instead of withholding them from all basic means to support themselves. According to him, the focus should be on criminal prosecution, 'because 1F applicants are human beings, they should be protected; and as they are criminals, they should be punished'. Currently, the opposite is happening, they are not protected and they are not tried either'.[826] According to Bruin: 'they are not criminally prosecuted, but considered to be guilty for good'.[827] I wonder whether such a practice as in the Netherlands regarding the group of non-removable excluded asylum seekers is perhaps a more severe punishment than serving a sentence after a criminal conviction? In the latter case, the person at least knows where he stands. In relation to this discussion, I would like to focus on the *Vinter and others* case[828] of the ECtHR.

This case concerned three applicants who are life sentence prisoners with 'whole life' tariffs, which means that they will never be considered for release other than on compassionate grounds, with a test which is almost never reached as no whole life prisoner has ever been released under section 30 of the 1997 Crime Sentences Act or any other power. The applicants argued that such a sentence without review was inhuman and degrading and thereby a violation of Article 3 ECHR. The sentence not only resulted in lifelong imprisonment but the denial of any hope. According to the Chamber, there had been no violation of Article 3 as whole life prison sentences were not of themselves inhuman or degrading and it was not argued in any of the cases that the point had been reached when the detention had become such as a matter of fact.[829] After this judgment, the applicants asked for a referral to the Grand Chamber for a review of the judgment which turned out differently than the first outcome.

The Court states that 'Indeed, there is also now clear support in European and international law for the principle that all prisoners, including those

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824 See § 5.2.2 for more on the Sison-case.

825 I will elaborate on this under § 8.3.2 and discuss the situation in the Netherlands.

826 Boeles 2008, p. 396.

827 Bruin 2013, p. 216.

828 ECtHR *Vinter and others v. the UK*, 9 July 2013, App. Nos. 66069/09, 130/10 and 3896/10 with an annotation from Van Kalmthout, *European Human Rights Cases* 2013/254.

829 <http://www.gcnchambers.co.uk/news/echr_whole_life_tariffs_judgment_vinter_and_others_v_uk> (last accessed on 21 September 2015).

serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved. While punishment remains one of the aims of imprisonment, the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence'.[830] From this viewpoint, 'the Court considers that, in the context of a life sentence, Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds. Where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention.[831] In this case of *Vinter and others*, the Court expressed that 'this contrast between the broad wording of section 30 (as interpreted by the Court of Appeal in a Convention-compliant manner, as it is required to be as a matter of UK law in accordance with the Human Rights Act) and the exhaustive conditions announced in the Prison Service Order, as well as the absence of any dedicated review mechanism for the whole life orders, the Court is not persuaded that, at the present time, the applicants' life sentences can be regarded as reducible for the purposes of Article 3 of the Convention. It accordingly finds that the requirements of Article 3 in this respect have not been met in relation to any of the three applicants'.[832]

The ECtHR emphasises in its judgment that those who are sentenced with life imprisonment for committing crimes of the worst kind should also be given a perspective. Having regard to this judgment, I again want to underline that I find it indefensible that an alien who is excluded on the basis of assumptions; not criminally prosecuted and cannot be removed is offered no perspective for a legal stay in the host country.

- *Judgment from the ECtHR is necessary*

Chapter 4 deals with the role of the ECHR in case of exclusion and focuses on the ECtHR's case law on 1F issues. Until present, several cases have been brought to Court which are almost all versus the Netherlands and concern mainly Afghans who served the KhAD/WAD. Unfortunately, no judgment has been delivered yet concerning the issues that have arisen in relation to Articles 3 and 8 ECHR. With regard to certain cases on Article 3, the Court rejected these complaints for 'being incompatible *ratione materiae* as

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830 See *Vinter and others* judgment, paras. 114-115.
831 Idem, paras. 119-121.
832 Idem, para. 130.

neither Article 3 nor any other provision of the Convention and its Protocols guarantees, as such, a right to a residence permit'. From a legal point of view, this is correct as the essence of Article 3 is to prevent the expulsion of a person in case he fears *refoulement*. On the other hand, it is undeniable that this establishment does not suffice anymore in view of the problems attached to it. It is very understandable that the Court has not ruled on what legal status should be accrued to persons who cannot be removed as it wants to leave the responsibility on deciding to the states. But what if a country does not take that responsibility? Let's consider the situation of excluded non-removable asylum seekers in the Netherlands who do not get a lawful stay, which lasts for many years and have no right to claim benefits etc. I have already mentioned that leaving a person in such a situation actually short-changes the significance of Article 3 ECHR. As the alien cannot be blamed for the fact he cannot be removed, it does not make sense to punish him in this way, which all adds up to withholding him what is necessary to be part of the society. Does this situation not also raise the Court with a duty? I stated above that I find that the Court's argument, that Article 3 does not guarantee as such a right to a residence permit does not suffice anymore, but additionally it does not do justice to Article 3 ECHR either. This is why the Court should comment on the situation of non-removable aliens who are left in limbo, especially focusing on the positive obligation ensuing from Article 3 ECHR.

In the cases in which the applicants relied upon Articles 3 ECHR, also the question is raised whether the consequences of a continuous denial of a permit, while no expulsion has taken place, leads to an Article 3 violation. In these cases, reference is made to the *M.S.S. v. Belgium and Greece* case in which the Court found the living conditions of the asylum seeker to be contrary to Article 3.[833] With regard to the two cases of the excluded asylum seekers in the Netherlands, the Court did not find a minimum level of severity to be present as was the case in *M.S.S.,* but one should not be surprised if, in future cases, the Court rules against the Netherlands. This would give an interesting turn to the discussion that is arisen in the country after two decisions of the ECSR in which the Committee considered that the legislation and practice of the Netherlands fails to ensure access to community shelter for the purpose of preventing homelessness and found that the practical and legal measures denying the right to emergency assistance accordingly restrict the right of adult migrants in an irregular situation and without adequate resources in the Netherlands in a disproportionate manner leads to the violation of Articles 13 (4) and 31 (2) of the Charter.[834] In the following I will elaborate on this

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[833] See § 4.2.4.

[834] Complaint no. 90/2013. Adoption: 1 July 2014, notification: 9 July 2014 and publicity: 10 November 2014 and complaint no. 86/2012. Adoption: 2 July 2014, notification: 9 July 2014 and publicity: 10 November 2014.

issue and look at the position of excluded asylum seekers in the Netherlands with the prospect of urgent future changes. Finally, concluding remarks on the UK will be provided in § 8.3.3.

§ 8.3.2 What future changes are needed in the Netherlands?

The initial response from the State Secretary to the two decisions of the European Committee of Social Rights was not to change anything in the current legislation and policy and to wait for a resolution to be taken by the Committee of Ministers regarding the matter. In the meantime, the ESCR's ruling has been followed by Dutch courts which obliged the authorities to temporarily give financial support to municipalities so that they can provide food, shelter and clothing to illegal aliens.[835] The group of illegal aliens relates to asylum seekers, whose applications for protection have been rejected and have exhausted all legal means, which may include excluded asylum seekers. In April 2015, the Committee adopted a resolution in which it did not make a specific recommendation to the government. This kindled the discussion on the matter between the two coalition parties as the Social-Democratic Labour Party wants to maintain the support and the People's Party for Freedom and Democracy does not. The latter party believes that providing such an assistance would attract even more asylum seekers to the Netherlands and lead to the situation where fewer leave the country. Theoretically this reasoning is correct, but what about the consequences of the practice for the person concerned and society? The authorities remain adamant being that these aliens are not welcome. However, the matter of the fact is they are in the country. In everyday life the municipalities are the ones who are stuck with the problems which often lead to tensions between central and local governments. It is not difficult to understand that illegal immigrants who wander around with no means of support may commit survival crimes and thus create insecurity and social unrest which is an undesirable situation for the community. The same is true for the group of non-removable excluded asylum seekers. Though the authorities insist that it does not want to be a safe haven for such criminals, the fact is they in the country and cannot be removed. The Dutch authorities must take responsibility as leaving these aliens to fend for themselves with all the consequences it entails, is no way to deal with this group of persons. In my opinion depriving 'a person' from all basic needs is not compatible with a democratic state as it breaches certain principles, primarily that of respect for human dignity. In order to substantiate my claim, I want to refer to a judgment of the District Court The Hague in which the court stated that decisions of the ECSR are significant for the interpretation of provisions of the ECHR, including Article 8. An applicant who was not allowed a legal stay in the country, was not able to support herself and not entitled to social service benefits was considered to

[835] See § 5.2.7.

be part of the group as decided on by the Committee. On this basis the court judged that withholding the applicant from food, shelter and clothing led to a violation of Article 8 ECHR.[836] Relevant to mention within this perspective is recital 12 of the Returns Directive in which also lays down that 'the situation of third country nationals who are staying illegally but who cannot yet be removed should be addressed and that their basic conditions of subsistence should be defined according to national legislation'. The determination of *refoulement* in the case of an excluded asylum seeker means the person cannot be sent back to his country of origin. The next step for authorities should be to check whether it is possible to expel the person to another safe country. This will not be an easy task and realistically there is little chance of success. As already mentioned in the previous paragraph, I believe that these non-removable excluded asylum seekers should be given a legal status for which the UK practice can be used as an example.[837]

The initial policy from the UK concerning non-removable excluded asylum seekers was the issuance of Discretionary Leave for six months with the possibility for extension. Under this leave, the alien has the right to work and access to public funds: no restrictions are imposed on the person. From September 2011 on, Discretionary Leave for excluded asylum seekers was replaced by Restricted Leave. Again this leave is for the duration of six months after which it is examined whether the alien can be removed. If not, leave is extended with another six months at a time. The main difference between the two forms of leave is that the latter introduces restrictions that can be imposed on the alien regarding, *inter alia*, work and residence. Considering the fact that asylum seekers are excluded and are not provided protection for a certain reason, I can understand why Discretionary Leave was considered as too easy for a lawful stay for these aliens as they were free to do what they wanted without any restrictions. In the end, one should not forget that there is a reason why a person is not provided with protection under the Refugee Convention. Imposing restrictions on a person increases the possibility for authorities to not lose sight of the person and it gives a clear message to the person that his stay is not a matter of course. In my view, the main point of the UK practice is that the alien is not left without a status. The High Court as well as the Court of Appeal played a relevant part in this. I will discuss this later further in § 8.3.3 on the UK. I believe that temporary leave is a good way of providing a legal stay for non-removable 1F applicants, but I do not think it makes sense to examine whether there is a change in the situation every six months to make removal possible. The state of affairs in the country of origin is often so serious that it is unlikely that *refoulement* is no longer important

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836 District Court The Hague 8 September 2015, *AWB* 15/1924.

837 This is in line with, *inter alia*, Ferdinandusse who also argued for a temporary residence permit and refers to Member of Parliament Van Oven who did the same in 1998. See Ferdinandusse 2002.

within such a short period of time. This is why I recommend an examination of the person's position each year which will give a better review of the situation. To return to what I have discussed above regarding the necessity to provide basic needs for non-removable 1F applicants. It is worthwhile mentioning that although those aliens under Restricted Leave do not have recourse to public funds, when they are destitute, they are provided with accommodation, subsistence or both.[838]

Prior to the introduction of the durability and proportionality-test, there was no clarity or any policy on the question until when the dead-end situation of the non-removable excluded asylum seeker could last. With this test, which is developed in the jurisprudence and adopted in the Aliens Circular,[839] it is first judged whether Article 3 offers a sustainable obstacle against removal to the country of origin, and if so, whether permanent denial of a residence title would be disproportionate in the particular circumstances of the case. The term sustainable obstacle refers to a stay of ten years in the Netherlands in a 'no removal, no admission' situation. Additionally, the IND expects the alien to undertake serious attempts to leave to another country with which he possibly has some bonding or has resided in the past. Though this latter is already a difficult condition to fulfil, it seems to be more difficult for the alien to make a reasonable case for his situation to be exceptional which makes it disproportionate to withhold a permit. The introduction of the test is a positive development as it created a way to grant the alien a legal resident status. However, the fact that the test leads to a temporary stay after so many years and it is practically impossible to fall under its terms makes it inconsequential. As discussed above, I argue for a temporary legal stay for those non-removable 1F applicants and their family members and do not believe these persons should wait ten years for their time in limbo to end.[840] I

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[838] A person is deemed to appear to be destitute if a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living conditions are met) or b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs (section 95 IAA 1999).

[839] C2/7.10.2.6 of the Aliens Circular.

[840] The current situation with regard to family members of excluded asylum seekers is that they normally do not receive a permit either. They can apply for asylum on individual grounds and are provided with a refugee status in case of eligibility for protection. When no asylum claim on individual grounds is accepted, family members experience the same terms as the excluded asylum seeker. Thus, when *refoulement* forms an obstacle for removal of the 1F applicant, family members are not expelled either which is in line with the case law of the ECtHR. See 8 November 2005, *Bader v. Sweden*, App. No. 13284/04 (Ars Aequi RV20050004 includes annotation from H. Battjes) and 22 June 2006, *D. v. Turkey*, App. No. 24245/03 (Ars Aequi RV20060003 includes annotation from H. Battjes). After a residence of ten years, family members are in principle no longer objected the contraindication of Article 1F. A recent case which received attention concerned that of the children Glaucio and

also think that at a certain point in time, these persons should be considered for settlement. As the High Court judged in the *N, R* case: 'Thus if someone has been here for ten years and subjected to a series of discretionary leaves for that period he will normally be able to remain here indefinitely. He will, after all, be expected by then to have made his life in this country, to have settled here, perhaps to have established family life here. The view is, again as it seems to me, entirely reasonably taken that generally speaking - and of course each case has to be considered on its own merits - such an individual will have leave to remain indefinitely and thus will be entitled to settle here'.[841] Given the government's view on 1F applicants, it is unrealistic to state that the whole group of non-removable 1F applicants should automatically be given a permit for an indefinite period of time after a stay of ten years. This is why I recommend to make a differentiation of subgroups who are offered a perspective for a permanent permit after ten years. The first group concerns those aliens who have legally residing family members in the Netherlands. As 1F applicants in the Netherlands are not entitled to any benefits, they are often dependent on their relatives and live together with them. With regard to those who fall into this category, there have been several cases before court in which the excluded alien invoked his right to family life in order to get a residence permit. The policy rule is that the interests of public order outweigh the interests of family life when it concerns a 1F applicant and there has not been a case to date in which an appeal to the right of family life has been accepted. It is very well possible that in a certain case the interests of the state outweigh the interests of the excluded asylum seeker, but I believe that the contrary is also possible: the outcome of such an assessment depends on the circumstances of the case such as the age of the children and the period of stay in the country and that is why Article 8 should not be ruled out from the very start. In any case, a permanent residence should be provided to the 1F applicant after ten years. Such a practice will prevent future cases such as of Amiri who after a stay of eighteen years is removed to Afghanistan and separated from his family.[842]

A second group of applicants who in my opinion qualify for settlement are those with a mental illness. In view of safety concerns for the society and stability regarding the alien's physical and mental constitution, it is relevant

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Marcia from Angola. The family arrived in 2000 in the Netherlands and were rejected asylum in 2005 as Article 1F was applied to the father. In August 2015, the family was to be removed to Angola which caused commotion in the society. Eventually, the mother and children had the choice of two alternatives which were; leaving to Angola altogether or the expulsion of the father alone. They chose the latter option and received residence based on the discretionary powers of the State Secretary. Until now, the father is not removed to Angola due to his medical situation.

841 *N, R (on the application of) v Secretary of State for the Home Department*, [2009] EWHC 1581, 3 April 2009, para. 22.

842 See § 5.3.

that he is given a decisive answer regarding his stay, so that a plan of care can be made for the person's future in the Netherlands. The last group to be mentioned concerns the ex-KhAD/WAD members. These aliens are excluded from asylum on the basis of the official report from 2000 in which is concluded that 'all non-commissioned officers and officers were active in the macabre divisions of the KhAD/WAD and were personally involved in the arrest, interrogation and sometimes execution of suspected persons'.[843] This conclusion led to a reversed burden of proof and thus a collective exclusion regarding those who belonged to this organisation. In view of settlement, it is relevant that is once again examined what the person's position was within the organisation and that those with a lower rank are eligible for settlement.

Since 2006 excluded asylum seekers, including those who cannot be removed, are declared undesirable aliens, entailing the imposition of an exclusion order. In 2011, the exclusion order was replaced by an entry ban, but not much changed as the consequences of both are similar: the person's stay in the Netherlands is punishable by criminal law. In addition, pressure is exerted on the person to leave; make sure he cannot obtain a legal stay in the country or legally enter the Netherlands for a certain period of time after his departure. According to the authorities, these measures are applied for the sake of public order, including the obligation to maintain international relations. This reasoning is difficult to understand with regard to the position of non-removable 1F applicants. Does it make sense to state that these measures serve the obligation to maintain international relations, if you are trying to put the burden concerning such alien's on another state?[844] The order/ban only criminalises their stay in the Netherlands while it is not their fault they cannot be removed. The fact that the Public Prosecutor does not proceed by prosecuting these persons, makes it even more pointless and therefore this practice has to stop.[845] In addition, this is necessary in order to enable the non-removable excluded asylum seeker to get a legal stay as I have explained and proposed in the foregoing.

§ 8.4 Concluding remarks on the Netherlands

The Dutch 1F-policy as developed over the years mainly referred to excluded ex-KhAD/WAD members and the consequences of this policy affected them the most. It is impossible to conclude this part on the Netherlands without

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[843] Report from the Ministry of Foreign Affairs, 'Intelligence services in communist Afghanistan (1978-1992), AGSA, KAM, KhAD and WAD', 29 February 2000, para. 2.7.

[844] Van Eik 2008, pp. 6-7.

[845] That the Public Prosecutor rarely proceeds with prosecution has to do with the fact that the alien will invoke circumstances beyond one's control for the situation he is still illegally residing in the Netherlands.

paying particular attention to this group which is almost the symbol of Article 1F in the Netherlands. Chapter 5 and § 8.2.2.1, give a detailed analysis of the problems and critique on the authorities relating to the KhAD/WAD. Though the Dutch official report from its Ministry of Foreign Affairs, which is the central point of the whole discussion, dates from 2000, one has not come any further over a period of already fifteen years. In view of the line of thinking of the governing parties and what is written down in the coalition agreement, it seems that no initiative for change is to be expected within the foreseeable future.
In 2008, the UNHCR came with its own Note on the KhAD/WAD and looking back I would say 2008 would have been a good opportunity to come to a solution. Besides the Note which gave occasion to consultations between the authorities and the Office, also the ACVZ came with an advisory report on 1F. Unfortunately, the discussions did not result in anything concrete. According to the authorities, the UNHCR did not conduct a specific research on the rotation system and new sources consulted after the publication of the 2000 report are unreliable or less unreliable. In other words, the Dutch government does not believe it is still possible to obtain reliable additional information. This is what the governing parties (consisting of the Christen Democrat Appeal, Labour Party and Christian Union) said in 2008 and this is what is said these days, which also explains why motions brought forward by opposition parties calling for a new independent research do not receive support in Parliament. There is no doubt that the Netherlands is facing a difficult task and it is undeniable that the government is at a loss with what to do with these persons. On the one hand, the government knows it has made a mistake by drawing such a far-reaching, absolute conclusion which led to the exclusion of a whole group of people and is based on a report containing anonymous sources. The fact that this situation has already lasted for such a long period of time and it is now heavily politicised makes it twice as hard to admit that it was not a very wise step, as the consequences are incalculable. On the other hand, the situation for this group of aliens has gone on long enough and the Netherlands is pursuing a dead-end 1F-policy and it must now take responsibility for this group.

Although a new investigation with respect to the conclusions of the KhAD/WAD report would be a good initiative, I do not believe this will be realised. Over the years, the authorities have refused to budge concerning the reports' correctness in which it is supported by the highest administrative court and it is just too late to take a step backwards. This does not mean that this group of men who are excluded on the basis of the report and who are still in the country must just be tolerated without an eventual lawful stay in prospect. As discussed in the previous paragraph, I find that instead of applying the durability and proportionality-test after ten years, which for the major part of the group turned out to be negative, a new policy rule must be introduced

to include subgroups who are eligible for settlement after ten years. The excluded KhAD/WAD members are one of these groups for which I propose a new individual examination of the person's position within the organisation. Those who did not have a high rank or great authority qualify for settlement while the others must be issued with a temporary legal stay with the option for extension. To this end, it is necessary to lift the exclusion orders/entry bans imposed on these men.
In 2013, the children's pardon was introduced which issues a legal stay to illegal children and their families in case the child has spent five years in the Netherlands before reaching the age of eighteen. In 2008, the ACVZ recommended to grant a legal residency to children of 1F applicants when they have reached the age of majority and actually spent at least five years in the Netherlands. The recommendation was of no avail as these children, which mainly concern Afghans with ex-KhAD/WAD fathers, fell outside the scope of the arrangement. At the age of 18 a young adult without a legal stay is not able to get any further education anymore. Given this relevant fact, I support the Advisory Committee's recommendation as well as other organisations such as Defence for Children who urge to enlarge the scope of the arrangement to include the children of excluded asylum seekers too, so that they do not have to stagnate in their development.[846]

The problems that the KhAD/WAD report presented in the Netherlands are ones to learn from and, in order to prevent such a situation from reoccurring the authorities should be cautious in drawing an absolute conclusion with respect to a whole group of people. The basic principle is to carry out an individual assessment for each person and to this end it is preferable to use individual reports when it concerns exclusion under Article 1F. In view of time and the efforts which are needed for individual reports, the reality is that often general country reports are used as a basis for exclusion. For both types of reports the use of anonymous evidence should be restricted to a minimum and in order to work correctly, it is relevant that more sources are available to substantiate which can back up certain conclusions. For this purpose, a close cooperation within the EU on data exchange is a must. The points and recommendations I have made under § 8.2.3 are relevant within this perspective as to reach uniformity between Member States one needs common official reports and a joint decision on reversing the burden of proof concerning a certain group. Furthermore, one should invest more time and effort into investigation leading to prosecution of the person. The

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[846] See also judgment of District Court Groningen 5 December 2014, *AWB* 14/7765 (JV 2015/36). The court ruled that the ten years rule for family members of a 1F applicant also counts for applications within the scope of the children's pardon. Currently this case is pending at the highest administrative court as the Secretary of State lodged an appeals against the judgment.

crimes which fall under Article 1F are serious ones and as stated earlier 'it was the notorious cases which the drafters of the Convention had in mind'. Though a criminal judgment is not necessary to apply Article 1F to an alien, the current tendency in countries, so also in the Netherlands and the UK is that it hardly happens. Prosecution and the fact that the case is eventually criminally judged will attach a certain value to the exclusion of the alien for which again data exchange on national as well as international level is essential. I would like to discuss one more aspect concerning 1F and that is the role of the judiciary.

The highest administrative court, Administrative Jurisdiction Division of the Council of State, played an important part in the fact that the Dutch authorities have insisted for years on the correctness of the KhAD/WAD report and still do. The data as provided by the UNHCR in 2 008 and also the ECJ's ruling in the *B and D* case made lower district courts question the official report and the practice of the reversed burden of proof with regard to ex-KhAD/WAD members. Each time, the highest court sided with the government and this is also a point of critique about this court.[847] Further it is put forward that the highest court does not see its role as the guardian of fundamental rights when it concerns migration law. In order to minimize the group of aliens who live in limbo, the highest court has introduced the durability and proportionality-test. Though this is a positive development adopted by the authorities, it is a pity that the court did not take it a step further by stating that non-removable excluded asylum seekers should not be left in limbo at all. The highest court must take on a greater supervisory role in order to point out to the authorities to take their responsibility as is consistent with a democracy based on the rule of law.

§ 8.5 Concluding remarks on the UK

The UK holds a distinctive position within the EU with regard to immigration as, for example, it does not participate in the Schengen cooperation which abolished internal border controls across the EU. As regards the CEAS, the UK has chosen to participate in this policy area and is bound by the EU asylum Directives which are adopted in the first phase such as the Qualification Directive. This is not the case with respect to the recasts adopted in the second phase, judging it not to be in 'Britain's best interests'.[848] Though this decision does affect the idea of European unity, I do not think it will mean that the UK is taking a step down concerning sharing responsibility in relation to asylum matters within the EU. As is already expressed by the Home Office:[849]

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[847] See § 5.4 for more.

[848] <http://www.migrationobservatory.ox.ac.uk/policy-primers/uk-common-european-asylum-system-and-eu-immigration-law> (last accessed on 21 September 2015).

[849] Home Office Commitment to Write: Debate on the Report of the European

'We have strong advocates for practical cooperation within the EU. In our view such practical cooperation has a more useful impact than the further layer of legislation represented by the CEAS, and we are committed to continue working with our EU partners in order to address the challenges we all face in preserving the integrity of our asylum systems and helping those who are genuinely in need. On this basis, we fully support the work of the EASO, and have sent our own experts to other Member States such as Greece to help build capacity and share best practice'.

The last-named commitment is very positive in light of my recommendation to set up joint official reports within Europe. The UK's participation in EASO is significant given the Country of Origin Information Service's experience in data collecting and its staff can play a valuable role within the organisation. As I have already stated above concerning the Netherlands; a close cooperation within the EU on data exchange is a must. Though the UK states its determination to provide help to those who are in need, it is also resolute in excluding those who do not deserve it. In the country's fight against terrorism, great caution is required to make sure that those who are excluded are actually the ones who do not deserve protection.
Contrary to the Netherlands, the UK is not stuck with a problematic group of excluded men like the ex-KhAD/WAD members as no reversed burden of proof is applied to any group. The policy as developed in the last ten years concerning those who are excluded under Article 1F has been strongly influenced by the judiciary, in which the judgment in the Afghan hijackers case played a crucial role.[850] These hijackers fell under Article 1F and it was established that the men could not be removed to Afghanistan due to *refoulement*. Under the policy which was applicable at that time, they should have been granted Discretionary Leave. Thus a legal stay for six months at a time, which could be extended with the same time period. When the authorities gave them temporary permission to stay in the UK instead, the High Court as well the Court of Appeal blocked the Home Secretary and ruled that the government had to keep to its own rules as temporary permission is not intended for those who are already examined; excluded and found not to be removable. The judgments of both courts has been of vital importance, because if they had not made these judgements, it would mean that a non-removable excluded asylum seeker, would have been left in a 'no removal, no admission situation'.

Union Committee on the EU's Global Approach to Migration and Mobility 2013 <http://www.parliament.uk/documents/lords-committees/eu-sub-com-f/GAMM/debatelettertaylor220613.pdf> (last accessed on 21 September 2015).

850 Another example in which the judiciary showed to play a relevant role is in the *MH (Syria) and DS (Afghanistan) v. SSHD* case. The authorities excluded DS because of his involvement in the KhAD and used among others the 2000 Dutch official report on the KhAD/WAD as evidence. The court did not accept this by referring to the criticism levelled at this report.

The Home Secretary decided to contest this decision and stated that he did not believe that 'those whose actions have undermined any legitimate claim to asylum should be granted leave to remain in the UK' and put his plan into action. This resulted in a separate part to the 2008 Criminal Justice and Immigration Act called Special Immigration Status. This is a specially created status for foreign criminals who cannot be removed due to *refoulement*, including those aliens who are excluded on the basis of Article 1F. The outstanding features of the status are that an alien who would falls under part 10 is not deemed to be granted leave nor temporary admission. Further, he can be imposed with conditions relating to residence, work and reporting and though such an alien is not in breach of immigrations laws, he is not eligible for a settled status in the end. This last mentioned was also the main goal of the Home Secretary's initiative, 'making sure that foreign criminals (including 1F applicants) would not be granted leave merely as a result of the fact they cannot be removed'. Though the Act received Royal Assent years ago, and thus part 10 it was approved by Parliament, it is still not in force and neither will it enter into force. Looking back at the government's actions after the Afghan hijackers case, it seems that the public indignation about the judgment is the main cause for the fact that something new was devised and eventually even convinced the majority of Parliament. I consider it meritable that given the efforts put in preparing part 10 of the Act, one realises it is not wise and necessary to bring into force a whole new status for unremovable 'criminal aliens' which was already put forward by several groups such as the Refugee Council. My main concern as regards the SIS is that it remains vague what the status actually would have implied as it is not similar to leave nor to temporary admission either. Given the fact that I think that non-removable excluded asylum seekers should be granted a lawful stay which was the case in the UK, it is good that it remains the way it is. The replacement of Discretionary Leave and what thus came instead of the SIS is namely Restricted Leave. This new form of leave offers a middle course: 'likewise Discretionary Leave, the alien maintains a lawful stay for six months which can be extended with the same period each time. On the other hand, restrictions may be imposed on the person regarding, *inter alia*, employment and residence like was intended under part 10. The major change is that the permissive character of Discretionary Leave is taken away. Family members of excluded asylum seekers may apply for asylum on individual grounds. In case it does not lead to protection and the excluded asylum seeker cannot be removed due to *refoulement*, they also fall under the current Restricted Leave. With regard to a claim by an excluded asylum seeker on the right to family life based on Article 8 ECHR this option is not ruled out from the very start, but it will not be easy to succeed, given the suitability and eligibility grounds that have to be met by the applicant.[851]

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[851] See § 6.3.7 for a discussion on the right to family life in the UK.

In the previous paragraph relating to the Netherlands, I advocated for providing a lawful stay to non-removable excluded asylum seekers and their families and mentioned that the UK practice can be well used as an example. Additionally, I recommended to issue leave/permits for a year instead of half a year each time. Similar to my reasoning as stated for the Netherlands, often the state of affairs in the country of origin is so serious it is unlikely for *refoulement* to be an option anymore within such a short period of time as six months.

UK rules enable aliens to receive indefinite leave after at least ten years continuous lawful residence in the UK. To be eligible for settlement, the alien must meet certain conditions, among which, that there must be no reason why granting such a leave is against the public good and the applicant does not fall under the general grounds for refusal.[852] As Restricted Leave is a lawful stay and non-removable excluded asylum seekers may legally qualify, the two mentioned conditions make it difficult for the alien to successfully qualify. Though it is finally the Secretary of State's decision who has to examine each case on its own merits and take into consideration all relevant factors of the case, when a 1F applicant is not issued indefinite leave due to public interest, this means, in concrete, that the policy of six months leave will still be maintained and that he has to wait for another ten years in order to be considered for a claim on the right to private life.[853] Similar to what I have urged above concerning the Netherlands, I reiterate that, at a certain point in time, an end has to come to the excluded asylum seeker and his family's uncertain situation because they cannot be blamed for the fact they are unremovable. It does not contribute anything to both parties to maintain a temporary stay after a residence of already ten years.

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[852] See § 6.3.5 for the details of these conditions.

[853] From July 2012 on, the old fourteen year rule (which existed next to the ten years long residence rule) and made it possible to apply for leave to remain in the UK on the basis of private life after fourteen years is changed into a residence of twenty years.

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APPENDIXES

Immigration Rules
Part 11

Asylum

This is a consolidated version of the current Immigration Rules.

326A. Procedure

The procedures set out in these Rules shall apply to the consideration of asylum and humanitarian protection.

326B. Where the Secretary of State is considering a claim for asylum or humanitarian protection under this Part, she will consider any Article 8 elements of that claim in line with the provisions of Appendix FM (family life) which are relevant to those elements and in line with paragraphs 276ADE to 276DH (private life) of these Rules unless the person is someone to whom Part 13 of these Rules applies.

Definition of asylum applicant

327. Under the Rules an asylum applicant is a person who either;

(a) makes a request to be recognised as a refugee under the Geneva Convention on the basis that it would be contrary to the United Kingdom's obligations under the Geneva Convention for him to be removed from or required to leave the United Kingdom, or

(b) otherwise makes a request for international protection. "Application for asylum" shall be construed accordingly.

327A. Every person has the right to make an application for asylum on his own behalf.

Applications for asylum

328. All asylum applications will be determined by the Secretary of State in accordance with the Geneva Convention. Every asylum application made by a person at a port or airport in the United Kingdom will be referred by the Immigration Officer for determination by the Secretary of State in accordance with these Rules.

328A. The Secretary of State shall ensure that authorities which are likely to be addressed by someone who wishes to make an application for asylum are able to advise that person how and where such an application may be made.

329. Until an asylum application has been determined by the Secretary of State or the Secretary of State has issued a certificate under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 no action will be taken to require the departure of the asylum applicant or his dependants from the United Kingdom.

330. If the Secretary of State decides to grant asylum and the person has not yet been given leave to enter, the Immigration Officer will grant limited leave to enter.

331. If a person seeking leave to enter is refused asylum or their application for asylum is withdrawn or treated as withdrawn under paragraph 333C of these Rules, the Immigration

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Officer will consider whether or not he is in a position to decide to give or refuse leave to enter without interviewing the person further. If the Immigration Officer decides that a further interview is not required he may serve the notice giving or refusing leave to enter by post. If the Immigration Officer decides that a further interview is required, he will then resume his examination to determine whether or not to grant the person leave to enter under any other provision of these Rules. If the person fails at any time to comply with a requirement to report to an Immigration Officer for examination, the Immigration Officer may direct that the person's examination shall be treated as concluded at that time. The Immigration Officer will then consider any outstanding applications for entry on the basis of any evidence before him.

332. If a person who has been refused leave to enter applies for asylum and that application is refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules, leave to enter will again be refused unless the applicant qualifies for admission under any other provision of these Rules.

333. Written notice of decisions on applications for asylum shall be given in reasonable time. Where the applicant is legally represented, notice may instead be given to the representative. Where the applicant has no legal representative and free legal assistance is not available, he shall be informed of the decision on the application for asylum and, if the application is rejected, how to challenge the decision, in a language that he may reasonably be supposed to understand.

333A. The Secretary of State shall ensure that a decision is taken by him on each application for asylum as soon as possible, without prejudice to an adequate and complete examination.

Where a decision on an application for asylum cannot be taken within six months of the date it was recorded, the Secretary of State shall either:

(a) inform the applicant of the delay; or

(b) if the applicant has made a specific written request for it, provide information on the timeframe within which the decision on his application is to be expected. The provision of such information shall not oblige the Secretary of State to take a decision within the stipulated time-frame.

333B. Applicants for asylum shall be allowed an effective opportunity to consult, at their own expense or at public expense in accordance with provision made for this by the Legal Services Commission or otherwise, a person who is authorised under Part V of the Immigration and Asylum Act 1999 to give immigration advice. This paragraph shall also apply where the Secretary of State is considering revoking a person's refugee status in accordance with these Rules.

Withdrawal of applications

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333C. If an application for asylum is withdrawn either explicitly or implicitly, consideration of it may be discontinued. An application will be treated as explicitly withdrawn if the applicant signs the relevant form provided by the Secretary of State. An application may be treated as impliedly withdrawn if an applicant leaves the United Kingdom without authorisation at any time prior to the conclusion of his or her asylum claim, or fails to complete an asylum questionnaire as requested by the Secretary of State, or fails to attend the personal interview as provided in paragraph 339NA of these Rules unless the applicant demonstrates within a reasonable time that that failure was due to circumstances beyond his or her control. The Secretary of State will indicate on the applicant's asylum file that the application for asylum has been withdrawn and consideration of it has been discontinued.

Grant of asylum

334. An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that:

(i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;

(ii) he is a refugee, as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;

(iii) there are no reasonable grounds for regarding him as a danger to the security of the United Kingdom;

(iv) he does not, having been convicted by a final judgment of a particularly serious crime, he does not constitute danger to the community of the United Kingdom; and

(v) refusing his application would result in him being required to go (whether immediately or after the time limited by any existing leave to enter or remain) in breach of the Geneva Convention, to a country in which his life or freedom would threatened on account of his race, religion, nationality, political opinion or membership of a particular social group.

335. If the Secretary of State decides to grant asylum to a person who has been given leave to enter (whether or not the leave has expired) or to a person who has entered without leave, the Secretary of State will vary the existing leave or grant limited leave to remain.

Refusal of asylum

336. An application which does not meet the criteria set out in paragraph 334 will be refused. Where an application for asylum is refused, the reasons in fact and law shall be stated in the decision and information provided in writing on how to challenge the decision.

337. DELETED

338. When a person in the United Kingdom is notified that asylum has been refused he may, if he is liable to removal as an illegal entrant , removal under section 10 of the Immigration and

Asylum Act 1999 or to deportation, at the same time be notified of removal directions, served with a notice of intention to make a deportation order, or served with a deportation order, as appropriate.

339. DELETED

Revocation or refusal to renew a grant of asylum

339A. A person's grant of asylum under paragraph 334 will be revoked or not renewed if the Secretary of State is satisfied that:

(i) he has voluntarily re-availed himself of the protection of the country of nationality;

(ii) having lost his nationality, he has voluntarily re-acquired it; or

(iii) he has acquired a new nationality, and enjoys the protection of the country of his new nationality;

(iv) he has voluntarily re-established himself in the country which he left or outside which he remained owing to a fear of persecution;

(v) he can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of nationality;

(vi) being a stateless person with no nationality, he is able, because the circumstances in connection with which he has been recognised a refugee have ceased to exist, to return to the country of former habitual residence;

(vii) he should have been or is excluded from being a refugee in accordance with regulation 7 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;

(viii) his misrepresentation or omission or facts, including the use of false documents, were decisive for the grant of asylum;

(ix) there are reasonable grounds for regarding him as a danger to the security of the United Kingdom; or

(x) having been convicted by a final judgment of a particularly serious crime he constitutes danger to the community of the United Kingdom.

In considering (v) and (vi), the Secretary of State shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.

Where an application for asylum was made on or after the 21st October 2004, the Secretary of State will revoke or refuse to renew a person's grant of asylum where he is satisfied that at least one of the provisions in sub-paragraph (i)-(vi) apply.

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339B. When a person's grant of asylum is revoked or not renewed any limited leave which they have may be curtailed.

339BA. Where the Secretary of State is considering revoking refugee status in accordance with these Rules, the person concerned shall be informed in writing that the Secretary of State is reconsidering his qualification for refugee status and the reasons for the reconsideration. That person shall be given the opportunity to submit, in a personal interview or in a written statement, reasons as to why his refugee status should not be revoked. If there is a personal interview, it shall be subject to the safeguards set out in these Rules. However, where a person acquires British citizenship status, his refugee status is automatically revoked in accordance with paragraph 339A (iii) upon acquisition of that status without the need to follow the procedure set out above.

Grant of humanitarian protection

339C. A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:

(i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;

(ii) he does not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;

(iii) substantial grounds have been shown for believing that the person concerned, if he returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country; and

(iv) he is not excluded from a grant of humanitarian protection.

Serious harm consists of:

(i) the death penalty or execution;

(ii) unlawful killing;

(iii) torture or inhuman or degrading treatment or punishment of a person in the country of return; or

(iv) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Exclusion from humanitarian protection

339D. A person is excluded from a grant of humanitarian protection under paragraph 339C (iv) where the Secretary of State is satisfied that:

(i) there are serious reasons for considering that he has committed a crime against peace, a war crime, a crime against humanity, or any other serious crime or instigated or otherwise participated in such crimes;

(ii) there are serious reasons for considering that he is guilty of acts contrary to the purposes and principles of the United Nations or has committed, prepared or instigated such acts or encouraged or induced others to commit, prepare or instigate instigated such acts;

(iii) there are serious reasons for considering that he constitutes a danger to the community or to the security of the United Kingdom; or

(iv) prior to his admission to the United Kingdom the person committed a crime outside the scope of (i) and (ii) that would be punishable by imprisonment were it committed in the United Kingdom and the person left his country of origin solely in order to avoid sanctions resulting from the crime.

339E. If the Secretary of State decides to grant humanitarian protection and the person has not yet been given leave to enter, the Secretary of State or an Immigration Officer will grant limited leave to enter. If the Secretary of State decides to grant humanitarian protection to a person who has been given limited leave to enter (whether or not that leave has expired) or a person who has entered without leave, the Secretary of State will vary the existing leave or grant limited leave to remain.

Refusal of humanitarian protection

339F. Where the criteria set out in paragraph 339C is not met humanitarian protection will be refused.

Revocation of humanitarian protection

339G. A person's humanitarian protection granted under paragraph 339C will be revoked or not renewed if the Secretary of State is satisfied that at least one of the following applies:

(i) the circumstances which led to the grant of humanitarian protection have ceased to exist or have changed to such a degree that such protection is no longer required;

(ii) the person granted humanitarian protection should have been or is excluded from humanitarian protection because there are serious reasons for considering that he has committed a crime against peace, a war crime, a crime against humanity, or any other serious crime or instigated or otherwise participated in such crimes;

(iii) the person granted humanitarian protection should have been or is excluded from humanitarian protection because there are serious reasons for considering that he is

guilty of acts contrary to the purposes and principles of the United Nations or has committed, prepared or instigated such acts or encouraged or induced others to commit, prepare or instigate such acts;

(iv) the person granted humanitarian protection should have been or is excluded from humanitarian protection because there are serious reasons for considering that he constitutes a danger to the community or to the security of the United Kingdom;

(v) the person granted humanitarian protection misrepresented or omitted facts, including the use of false documents, which were decisive to the grant of humanitarian protection; or

(vi) the person granted humanitarian protection should have been or is excluded from humanitarian protection because prior to his admission to the United Kingdom the person committed a crime outside the scope of (ii) and (iii) that would be punishable by imprisonment had it been committed in the United Kingdom and the person left his country of origin solely in order to avoid sanctions resulting from the crime.

In applying (i) the Secretary of State shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the person no longer faces a real risk of serious harm;

339H. When a person's humanitarian protection is revoked or not renewed any limited leave which they have may be curtailed.

Consideration of applications

339HA. The Secretary of State shall ensure that the personnel examining applications for asylum and taking decisions on his behalf have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law.

339I. When the Secretary of State considers a person's asylum claim, eligibility for a grant of humanitarian protection or human rights claim it is the duty of the person to submit to the Secretary of State as soon as possible all material factors needed to substantiate the asylum claim or establish that he is a person eligible for humanitarian protection or substantiate the human rights claim, which the Secretary of State shall assess in cooperation with the person.

The material factors include:

(i) the person's statement on the reasons for making an asylum claim or on eligibility for a grant of humanitarian protection or for making a human rights claim;

(ii) all documentation at the person's disposal regarding the person's age, background (including background details of relevant relatives), identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes; and

(iii) identity and travel documents.

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339IA. For the purposes of examining individual applications for asylum

(i) information provided in support of an application and the fact that an application has been made shall not be disclosed to the alleged actor(s) of persecution of the applicant, and

(ii) information shall not be obtained from the alleged actor(s) of persecution that would result in their being directly informed that an application for asylum has been made by the applicant in question and would jeopardise the physical integrity of the applicant and his dependants, or the liberty and security of his family members still living in the country of origin.

This paragraph shall also apply where the Secretary of State is considering revoking a person's refugee status in accordance with these Rules.

339J. The assessment by the Secretary of State of an asylum claim, eligibility for a grant of humanitarian protection or a human rights claim will be carried out on an individual, objective and impartial basis. This will include taking into account in particular:

(i) all relevant facts as they relate to the country of origin or country of return at the time of taking a decision on the grant; including laws and regulations of the country of origin or country of return and the manner in which they are applied;

(ii) relevant statements and documentation presented by the person including information on whether the person has been or may be subject to persecution or serious harm;

(iii) the individual position and personal circumstances of the person, including factors such as background, gender and age, so as to assess whether, on the basis of the person's personal circumstances, the acts to which the person has been or could be exposed would amount to persecution or serious harm;

(iv) whether the person's activities since leaving the country of origin or country of return were engaged in for the sole or main purpose of creating the necessary conditions for making an asylum claim or establishing that he is a person eligible for humanitarian protection or a human rights claim, so as to assess whether these activities will expose the person to persecution or serious harm if he returned to that country; and

(v) whether the person could reasonably be expected to avail himself of the protection of another country where he could assert citizenship.

339JA. Reliable and up-to-date information shall be obtained from various sources as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited. Such information shall be made available to the personnel responsible for examining applications and taking decisions and may be provided to them in the form of a consolidated country information report.

This paragraph shall also apply where the Secretary of State is considering revoking a person's refugee status in accordance with these Rules.

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339K. The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

339L. It is the duty of the person to substantiate the asylum claim or establish that he is a person eligible humanitarian protection or substantiate his human rights claim. Where aspects of the person's statements are not supported by documentary or other evidence, those aspects will not need confirmation when all of the following conditions are met:

(i) the person has made a genuine effort to substantiate his asylum claim or establish that he is a person eligible humanitarian protection or substantiate his human rights claim;

(ii) all material factors at the person's disposal have been submitted, and a satisfactory explanation regarding any lack of other relevant material has been given;

(iii) the person's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the person's case;

(iv) the person has made an asylum claim or sought to establish that he is a person eligible for humanitarian protection or made a human rights claim at the earliest possible time, unless the person can demonstrate good reason for not having done so; and

(v) the general credibility of the person has been established.

339M. The Secretary of State may consider that a person has not substantiated his asylum claim or established that he is a person eligible for humanitarian protection or substantiated his human rights claim, and thereby reject his application for asylum, determine that he is not eligible for humanitarian protection or reject his human rights claim, if he fails, without reasonable explanation, to make a prompt and full disclosure of material facts, either orally or in writing, or otherwise to assist the Secretary of State in establishing the facts of the case; this includes, for example, failure to report to a designated place to be fingerprinted, failure to complete an asylum questionnaire or failure to comply with a requirement to report to an immigration officer for examination.

339MA. Applications for asylum shall be neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible.

339N. In determining whether the general credibility of the person has been established the Secretary of State will apply the provisions in s.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

Personal interview

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339NA. Before a decision is taken on the application for asylum, the applicant shall be given the opportunity of a personal interview on his application for asylum with a representative of the Secretary of State who is legally competent to conduct such an interview.

The personal interview may be omitted where:

(i) the Secretary of State is able to take a positive decision on the basis of evidence available;

(ii) the Secretary of State has already had a meeting with the applicant for the purpose of assisting him with completing his application and submitting the essential information regarding the application;

(iii) the applicant, in submitting his application and presenting the facts, has only raised issues that are not relevant or of minimal relevance to the examination of whether he is a refugee, as defined in regulation 2 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006;

(iv) the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his claim clearly unconvincing in relation to his having been the object of persecution;

(v) the applicant has submitted a subsequent application which does not raise any relevant new elements with respect to his particular circumstances or to the situation in his country of origin;

(vi) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his removal; and

(vii) it is not reasonably practicable, in particular where the Secretary of State is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his control.

The omission of a personal interview shall not prevent the Secretary of State from taking a decision on the application.

Where the personal interview is omitted, the applicant and dependants shall be given a reasonable opportunity to submit further information.

339NB. (i) The personal interview mentioned in paragraph 339NA above shall normally take place without the presence of the applicant's family members unless the Secretary of State considers it necessary for an appropriate examination to have other family members present.

(ii) The personal interview shall take place under conditions which ensure appropriate confidentiality.

339NC (i) A written report shall be made of every personal interview containing at least the essential information regarding the asylum application as presented by the applicant in accordance with paragraph 339I of these Rules.

(ii) The Secretary of State shall ensure that the applicant has timely access to the report of the personal interview and that access is possible as soon as necessary for allowing an appeal to be prepared and lodged in due time.

339ND The Secretary of State shall provide at public expense an interpreter for the purpose of allowing the applicant to submit his case, wherever necessary. The Secretary of State shall select an interpreter who can ensure appropriate communication between the applicant and the representative of the Secretary of State who conducts the interview.

Internal relocation

339O (i) The Secretary of State will not make:

(a) a grant of asylum if in part of the country of origin a person would not have a well founded fear of being persecuted, and the person can reasonably be expected to stay in that part of the country;
or

(b) a grant of humanitarian protection if in part of the country of return a person would not face a real risk of suffering serious harm, and the person can reasonably be expected to stay in that part of the country.

(ii) In examining whether a part of the country of origin or country of return meets the requirements in (i) the Secretary of State, when making his decision on whether to grant asylum or humanitarian protection, will have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the person.

(iii) (i) applies notwithstanding technical obstacles to return to the country of origin or country of return

Sur place claims

339P. A person may have a well-founded fear of being persecuted or a real risk of suffering serious harm based on events which have taken place since the person left the country of origin or country of return and/or activates which have been engaged in by a person since he left he country of origin or country of return, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin or country of return.

Residence Permits

339Q(i) The Secretary of State will issue to a person granted asylum in the United Kingdom a United Kingdom Residence Permit (UKRP) as soon as possible after the grant of asylum. The

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UKRP may be valid for five years and renewable, unless compelling reasons of national security or public order otherwise require or where there are reasonable grounds for considering that the applicant is a danger to the security of the UK or having been convicted by a final judgment of a particularly serious crime, the applicant constitutes a danger to the community of the UK or the person's character, conduct or associations otherwise require.

(ii) The Secretary of State will issue to a person granted humanitarian protection in the United Kingdom a UKRP as soon as possible after the grant of humanitarian protection. The UKRP may be valid for five years and renewable, unless compelling reasons of national security or public order otherwise require or where there are reasonable grounds for considering that the person granted humanitarian protection is a danger to the security of the UK or having been convicted by a final judgment of a serious crime, this person constitutes a danger to the community of the UK or the person's character, conduct or associations otherwise require.

(iii) The Secretary of State will issue a UKRP to a family member of a person granted asylum or humanitarian protection where the family member does not qualify for such status. A UKRP may be granted for a period of five years. The UKRP is renewable on the terms set out in (i) and (ii) respectively. "Family member" for the purposes of this sub-paragraph refers only to those who are treated as dependants for the purposes of paragraph 349.

(iv) The Secretary of State may revoke or refuse to renew a person's UKRP where their grant of asylum or humanitarian protection is revoked under the provisions in the immigration rules.

Requirements for indefinite leave to remain for persons granted asylum or humanitarian protection

339R. The requirements for indefinite leave to remain for a person granted asylum or humanitarian protection, or their dependants granted asylum or humanitarian protection in line with the main applicant or any dependant granted in accordance with the requirements of paragraphs 352A to 352FJ of these Rules (Family Reunion), are that:

(i) the applicant has held a UK Residence Permit (UKRP) issued under paragraph 339Q for a continuous period of five years in the UK; and

(ii) the applicant's UKRP has not been revoked or not renewed under paragraphs 339A or 339G of the immigration rules; and

(iii) the applicant has not:

a. been convicted of an offence for which they have been sentenced to imprisonment for at least 4 years; or

b. been convicted of an offence for which they have been sentenced to imprisonment for at least 12 months but less than 4 years, unless a period of 15 years has passed since the end of the sentence; or

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c. been convicted of an offence for which they have been sentenced to imprisonment for less than 12 months, unless a period of 7 years has passed since the end of the sentence; or

d. within the 24 months prior to the date on which the application has been decided, been convicted of or admitted an offence for which they have received a non-custodial sentence or other out of court disposal that is recorded on their criminal record; or

e. in the view of the Secretary of State caused serious harm by their offending or persistently offended and shown a particular disregard for the law; or

f. in the view of the Secretary of State, at the date on which the application has been decided, demonstrated the undesirability of granting settlement in the United Kingdom in light of his or her conduct (including convictions which do not fall within paragraphs 339R(iii)(a-e)), character or associations or the fact that he or she represents a threat to national security.

Indefinite leave to remain for a person granted asylum or humanitarian protection

339S. Indefinite leave to remain for a person granted asylum or humanitarian protection will be granted where each of the requirements in paragraph 339R is met.

Refusal of indefinite leave to remain for a person granted asylum or humanitarian protection

339T. (i) Indefinite leave to remain for a person granted asylum or humanitarian protection is to be refused if any of the requirements of paragraph 339R is not met.

(ii) An applicant refused indefinite leave to remain under paragraph 339T(i) may apply to have their UK Residence Permit extended in accordance with paragraph 339Q.

Consideration of asylum applications and human rights claims

340. DELETED

341. DELETED

342. The actions of anyone acting as an agent of the asylum applicant or human rights claimant may also be taken into account in regard to the matters set out in paragraphs 340 and 341.

343. DELETED

344. DELETED

Travel documents

344A(i). After having received a complete application for a travel document, the Secretary of State will issue to a person granted asylum in the United Kingdom and their family members travel documents, in the form set out in the Schedule to the Geneva Convention, for the purpose of travel outside the United Kingdom, unless compelling reasons of national security or public order otherwise require.

(ii) After having received a complete application for a travel document, the Secretary of State will issue travel documents to a person granted humanitarian protection in the United Kingdom where that person is unable to obtain a national passport or other identity documents which enable him to travel, unless compelling reasons of national security or public order otherwise require.

(iii) Where the person referred to in (ii) can obtain a national passport or identity documents but has not done so, the Secretary of State will issue that person with a travel document where he can show that he has made reasonable attempts to obtain a national passport or identity document and there are serious humanitarian reasons for travel.

Access to Employment

344B. The Secretary of State will not impose conditions restricting the employment or occupation in the United Kingdom of a person granted asylum or humanitarian protection.

Information

344C. A person who is granted asylum or humanitarian protection will be provided with access to information in a language that they may reasonably be supposed to understand which sets out the rights and obligations relating to that status. The Secretary of State will provide the information as soon as possible after the grant of asylum or humanitarian protection.

Third country cases

345. (1) In a case where the Secretary of State is satisfied that the conditions set out in Paragraphs 4 and 5(1), 9 and 10(1), 14 and 15(1) or 17 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 are fulfilled, he will normally decline to

examine the asylum application substantively and issue a certificate under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 as appropriate.

(2) The Secretary of State shall not issue a certificate under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 unless:

(i) the asylum applicant has not arrived in the United Kingdom directly from the country in which he claims to fear persecution and has had an opportunity at the border or within the third country or territory to make contact with the authorities of that third country or territory in order to seek their protection; or

(ii) there is other clear evidence of his admissibility to a third country or territory.

Provided that he is satisfied that a case meets these criteria, the Secretary of State is under no obligation to consult the authorities of the third country or territory before the removal of an asylum applicant to that country or territory.

345(2A) Where a certificate is issued under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 the asylum applicant shall:

(i) be informed in a language that he may reasonably be expected to understand regarding his removal to a safe third country;

(ii) be provided with a document informing the authorities of the safe third country, in the language of that country, that the asylum application has not been examined in substance by the authorities in the United Kingdom;

(iii) sub-paragraph 345(2A)(ii) shall not apply if removal takes place with reference to the arrangements set out in Regulation (EC) No. 343/2003 (the Dublin Regulation) or Regulation (EC) No. 604/2013; and

iv) if an asylum applicant removed under this paragraph is not admitted to the safe third country (not being a country to which the Dublin Regulation applies as specified in paragraph 345(2A)(iii)), subject to determining and resolving the reasons for his nonadmission, the asylum applicant shall be admitted to the asylum procedure in the United Kingdom.

(3) Where a certificate is issued under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 in relation to the asylum claim and the person is seeking leave to enter the Immigration Officer will consider whether or not he is in a position to decide to give or refuse leave to enter without interviewing the person further. If the Immigration Officer decides that a further interview is not required he may serve the notice giving or refusing leave to enter by post. If the Immigration Officer decides that a further interview is required, he will then resume his examination to determine whether or not to grant the person leave to enter under any other provision of these Rules. If the person fails at any time to comply with a requirement to report to an Immigration Officer for examination, the Immigration Officer may direct that the person's examination shall be treated as concluded at

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that time. The Immigration Officer will then consider any outstanding applications for entry on the basis of any evidence before him.

(4) Where a certificate is issued under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 the person may, if liable to removal as an illegal entrant, or removal under section 10 of the Immigration and Asylum Act 1999 or to deportation, at the same time be notified of removal directions, served with a notice of intention to make a deportation order, or served with a deportation order, as appropriate.

Previously rejected applications

346. DELETED

347. DELETED

Rights of appeal

348. DELETED

Dependants

349. A spouse, civil partner, unmarried or same-sex partner, or minor child accompanying a principal applicant may be included in his application for asylum as his dependant, provided, in the case of an adult dependant with legal capacity, the dependant consents to being treated as such at the time the application is lodged. A spouse, civil partner, unmarried or same-sex partner or minor child may also claim asylum in his own right. If the principal applicant is granted asylum or humanitarian protection and leave to enter or remain any spouse, civil partner, unmarried or same-sex partner or minor child will be granted leave to enter or remain for the same duration. The case of any dependant who claims asylum in his own right will be also considered individually in accordance with paragraph 334 above. An applicant under this paragraph, including an accompanied child, may be interviewed where he makes a claim as a dependant or in his own right.

If the spouse, civil partner, unmarried or same-sex partner, or minor child in question has a claim in his own right, that claim should be made at the earliest opportunity. Any failure to do so will be taken into account and may damage credibility if no reasonable explanation for it is given. Where an asylum or humanitarian protection application is unsuccessful, at the same time that asylum or humanitarian protection is refused the applicant may be notified of removal directions or served with a notice of the Secretary of State's intention to deport him, as appropriate. In this paragraph and paragraphs 350-352 a child means a person who is under 18 years of age or who, in the absence of documentary evidence establishing age, appears to be

under that age. An unmarried or same sex partner for the purposes of this paragraph, is a person who has been living together with the principal applicant in a subsisting relationship akin to marriage or a civil partnership for two years or more.

Unaccompanied children

350. Unaccompanied children may also apply for asylum and, in view of their potential vulnerability, particular priority and care is to be given to the handling of their cases.

351. A person of any age may qualify for refugee status under the Convention and the criteria in paragraph 334 apply to all cases. However, account should be taken of the applicant's maturity and in assessing the claim of a child more weight should be given to objective indications of risk than to the child's state of mind and understanding of his situation. An asylum application made on behalf of a child should not be refused solely because the child is too young to understand his situation or to have formed a well founded fear of persecution. Close attention should be given to the welfare of the child at all times.

352. Any child over the age of 12 who has claimed asylum in his own right shall be interviewed about the substance of his claim unless the child is unfit or unable to be interviewed. When an interview takes place it shall be conducted in the presence of a parent, guardian, representative or another adult independent of the Secretary of State who has responsibility for the child. The interviewer shall have specialist training in the interviewing of children and have particular regard to the possibility that a child will feel inhibited or alarmed. The child shall be allowed to express himself in his own way and at his own speed. If he appears tired or distressed, the interview will be suspended. The interviewer should then consider whether it would be appropriate for the interview to be resumed the same day or on another day.

352ZA. The Secretary of State shall as soon as possible after an unaccompanied child makes an application for asylum take measures to ensure that a representative represents and/or assists the unaccompanied child with respect to the examination of the application and ensure that the representative is given the opportunity to inform the unaccompanied child about the meaning and possible consequences of the interview and, where appropriate, how to prepare himself for the interview. The representative shall have the right to be present at the interview and ask questions and make comments in the interview, within the framework set by the interviewer.

352ZB. The decision on the application for asylum shall be taken by a person who is trained to deal with asylum claims from children.

Requirements for limited leave to remain as an unaccompanied asylum seeking child.

352ZC The requirements to be met in order for a grant of limited leave to remain to be made in relation to an unaccompanied asylum seeking child under paragraph 352ZE are:

a) the applicant is an unaccompanied asylum seeking child under the age of 17 ½ years throughout the duration of leave to be granted in this capacity;

b) the applicant must have applied for asylum and been refused Refugee Leave and Humanitarian Protection;

c) there are no adequate reception arrangements in the country to which they would be returned if leave to remain was not granted;

d) the applicant must not be excluded from a grant of asylum under Regulation 7 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 or excluded from a grant of Humanitarian Protection under paragraph 339D or both;

e) there are no reasonable grounds for regarding the applicant as a danger to the security of the United Kingdom;

f) the applicant has not been convicted by a final judgment of a particularly serious crime, and the applicant does not constitute a danger to the community of the United Kingdom; and

g) the applicant is not, at the date of their application, the subject of a deportation order or a decision to make a deportation order.

352ZD An unaccompanied asylum seeking child is a person who:

a) is under 18 years of age when the asylum application is submitted.

b) is applying for asylum in their own right; and

c) is separated from both parents and is not being cared for by an adult who in law or by custom has responsibility to do so.

352ZE. Limited leave to remain should be granted for a period of 30 months or until the child is 17 ½ years of age whichever is shorter, provided that the Secretary of State is satisfied that the requirements in paragraph 352ZC are met.

352ZF. Limited leave granted under this provision will cease if

a) any one or more of the requirements listed in paragraph 352ZC cease to be met, or

b) a misrepresentation or omission of facts, including the use of false documents, were decisive for the grant of leave under 352ZE.

352A. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the spouse civil partner of a refugee are that:

(i) the applicant is married to or the civil partner of a person who is currently a refugee granted status as such under the immigration rules in the United Kingdom ; and

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(ii) the marriage or civil partnership did not take place after the person granted asylum left the country of his former habitual residence in order to seek asylum; an

(iii) the applicant would not be excluded from protection by virtue of article 1F of the United Nations Convention and Protocol relating to the Status of Refugees if he were to seek asylum in his own right; and

(iv) each of the parties intends to live permanently with the other as his or her spouse civil partner and the marriage is subsisting; and

(v) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

352AA. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the unmarried or the same-sex partner of a refugee are that:

(i) the applicant is the unmarried or same-sex partner of a person who is currently a refugee granted status as such under the immigration rules in the United Kingdom and was granted that status in the UK on or after 9th October 2006; and

(ii) the parties have been living together in a relationship akin to either a marriage or a civil partnership which has subsisted for two years or more; and

(iii) the relationship existed before the person granted asylum left the country of his former habitual residence in order to seek asylum; and

(iv) the applicant would not be excluded from protection by virtue of paragraph 334(iii) or

(v) of these Rules or article 1F of the Geneva Convention if he were to seek asylum in his own right; and

(vi) each of the parties intends to live permanently with the other as his or her unmarried or same-sex partner and the relationship is subsisting; and

(vii) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

(viii) the parties are not involved in a consanguineous relationship with one another; and

352B. Limited leave to enter the United Kingdom as the spouse civil partner of a refugee may be granted provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival. Limited leave to remain in the United Kingdom as the spouse of a refugee may be granted provided the Secretary of State is satisfied that each of the requirements of paragraph 352A (i) - (v) are met.

352BA Limited leave to enter the United Kingdom as the unmarried or same-sex partner of a refugee may be granted provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival. Limited leave to remain in the United Kingdom as the unmarried or same sex partner of a refugee may be granted provided the

Secretary of State is satisfied that each of the requirements of paragraph 352AA (i) - (vii) are met.

352C. Limited leave to enter the United Kingdom as the spouse civil partner of a refugee is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival. Limited leave to remain as the spouse civil partner of a refugee is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 352A (i) - (v) are met.

352CA Limited leave to enter the United Kingdom as the unmarried or same-sex partner of a refugee is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival. Limited leave to remain as the unmarried or same sex partner of a refugee is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 352AA (i) - (vi) are met.

352D. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with the parent who is currently a refugee granted status as such under the immigration rules in the United Kingdom are that the applicant:

(i) is the child of a parent who is currently a refugee granted status as such under the immigration rules in the United Kingdom; and

(ii) is under the age of 18, and

(iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(iv) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of his habitual residence in order to seek asylum; and

(v) would not be excluded from protection by virtue of article 1F of the United Nations Convention and Protocol relating to the Status of Refugees if he were to seek asylum in his own right; and

(vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.

352E. Limited leave to enter the United Kingdom as the child of a refugee may be granted provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival. Limited leave to remain in the United Kingdom as the child of a refugee may be granted provided the Secretary of State is satisfied that each of the requirements of paragraph 352D (i) - (v) are met.

352F. Limited leave to enter the United Kingdom as the child of a refugee is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival. Limited leave to remain as the child of a refugee is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 352D (i) - (v) are met.

352FA. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the spouse or civil partner of a person who is currently a beneficiary of humanitarian protection granted under the immigration rules in the United Kingdom and was granted that status on or after 30 August 2005 are that:

(i) the applicant is married to or the civil partner of a person who is currently a beneficiary of humanitarian protection granted under the immigration rules and was granted that status on or after 30 August 2005; and

(ii) the marriage or civil partnership did not take place after the person granted humanitarian protection left the country of his former habitual residence in order to seek asylum in the UK; and

(iii) the applicant would not be excluded from a grant of humanitarian protection for any of the reasons in paragraph 339D; and

(iv) each of the parties intend to live permanently with the other as his or her spouse or civil partner and the marriage or civil partnership is subsisting; and

(v) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

352FB. Limited leave to enter the United Kingdom as the spouse or civil partner of a person granted humanitarian protection may be granted provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival. Limited leave to remain in the United Kingdom as the spouse or civil partner of a person granted humanitarian protection may be granted provided the Secretary of State is satisfied that each of the requirements in sub paragraphs 352FA(i) - (iv) are met.

352FC. Limited leave to enter the United Kingdom as the spouse or civil partner of a person granted humanitarian protection is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival. Limited leave to remain as the spouse or civil partner of a person granted humanitarian protection is to be refused if the Secretary of State is not satisfied that each of the requirements in sub paragraphs 352FA (i) - (iv) are met.

352FD. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the unmarried or same-sex partner of a person who is currently a beneficiary of humanitarian protection granted under the immigration rules in the United Kingdom are that:

(i) the applicant is the unmarried or same-sex partner of a person who is currently a beneficiary of humanitarian protection granted under the immigration rules and was granted that status on or after 9th October 2006; and

(ii) the parties have been living together in a relationship akin to either a marriage or a civil partnership which has subsisted for two years or more; and

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(iii) the relationship existed before the person granted humanitarian protection left the country of his former habitual residence in order to seek asylum; and

(iv) the applicant would not be excluded from a grant of humanitarian protection for any of the reasons in paragraph 339D; and

(v) each of the parties intends to live permanently with the other as his or her unmarried or same-sex partner and the relationship is subsisting; and

(vi) the parties are not involved in a consanguineous relationship with one another; and

(vii) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

352FE. Limited leave to enter the United Kingdom as the unmarried or same-sex partner of a person granted humanitarian protection may be granted provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival. Limited leave to remain in the United Kingdom as the unmarried or same sex partner of a person granted humanitarian protection may be granted provided the Secretary of State is satisfied that each of the requirements in subparagraphs 352FD (i) - (vi) are met.

352FF. Limited leave to enter the United Kingdom as the unmarried or same-sex partner of a person granted humanitarian protection is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival. Limited leave to remain as the unmarried or same sex partner of a person granted humanitarian protection is to be refused if the Secretary of State is not satisfied that each of the requirements in sub paragraphs 352FD(i) - (vi) are met.

352FG. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with their parent who is currently a beneficiary of humanitarian protection granted under the immigration rules in the United Kingdom and was granted that status on or after 30 August 2005 are that the applicant:

(i) is the child of a parent who is currently a beneficiary of humanitarian protection granted under the immigration rules in the United Kingdom and was granted that status on or after 30 August 2005; and

(ii) is under the age of 18, and

(iii) is not leading an independent life, is unmarried or is not in a civil partnership, and has not formed an independent family unit; and

(iv) was part of the family unit of the person granted humanitarian protection at the time that the person granted humanitarian protection left the country of his habitual residence in order to seek asylum in the UK; and

(v) would not be excluded from a grant of humanitarian protection for any of the reasons in paragraph 339D; and

(vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.

352FH. Limited leave to enter the United Kingdom as the child of a person granted humanitarian protection may be granted provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival. Limited leave to remain in the United Kingdom as the child of a person granted humanitarian protection may be granted provided the Secretary of State is satisfied that each of the requirements in sub paragraphs 352FG (i) -(v) are met.

352FI. Limited leave to enter the United Kingdom as the child of a person granted humanitarian protection is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival. Limited leave to remain as the child of a person granted humanitarian protection is to be refused if the Secretary of State is not satisfied that each of the requirements in sub paragraphs 352FG (i) -(v) are met.

352FJ. Nothing in paragraphs 352A-352FI shall allow a person to be granted leave to enter or remain in the United Kingdom as the spouse or civil partner, unmarried or same sex partner or child of a refugee, or of a person granted humanitarian protection under the immigration rules in the United Kingdom on or after 30 August 2005, if the refugee or, as the case may be, person granted humanitarian protection, is a British Citizen.

Interpretation

352G. For the purposes of this Part:

(a) "Geneva Convention" means the United Nations Convention and Protocol relating to the Status of Refugees;

(b) "Country of return" means a country or territory listed in paragraph 8(c) of Schedule 2 of the Immigration Act 1971;

(c) "Country of origin" means the country or countries of nationality or, for a stateless person, or former habitual residence.

Restriction on study

352H. Where a person is granted leave in accordance with the provisions set out in Part 11 of the Immigration Rules that leave will, in addition to any other conditions which may apply, be granted subject to the condition in Part 15 of these Rules.

CRIMINAL JUSTICE AND IMMIGRATION ACT

PART 10 SPECIAL IMMIGRATION STATUS

130 Designation

(1) The Secretary of State may designate a person who satisfies Condition 1 or 2 (subject to subsections (4) and (5)).

(2) Condition 1 is that the person—

(a) is a foreign criminal within the meaning of section 131, and

(b)is liable to deportation, but cannot be removed from the United Kingdom because of section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention).

(3) Condition 2 is that the person is a member of the family of a person who satisfies Condition 1.

(4) A person who has the right of abode in the United Kingdom may not be designated.

(5 The Secretary of State may not designate a person if the Secretary of State thinks that an effect of designation would breach—

(a) the United Kingdom's obligations under the Refugee Convention, or

(b) the person's rights under the Community treaties.

131 "Foreign criminal"

(1) For the purposes of section 130 "foreign criminal" means a person who—

(a) is not a British citizen, and

(b) satisfies any of the following Conditions.

(2) Condition 1 is that section 72(2)(a) and (b) or (3)(a) to (c) of the Nationality, Immigration and Asylum Act 2002 (c. 41) applies to the person (Article 33(2) of the Refugee Convention: imprisonment for at least two years).

(3) Condition 2 is that—

(a) section 72(4)(a) or (b) of that Act applies to the person (person convicted of specified offence), and

(b) the person has been sentenced to a period of imprisonment.

(4) Condition 3 is that Article 1F of the Refugee Convention applies to the person (exclusions for criminals etc.).

(5) Section 72(6) of that Act (rebuttal of presumption under section 72(2) to (4)) has no effect in relation to Condition 1 or 2.

(6) Section 72(7) of that Act (non-application pending appeal) has no effect in relation to Condition 1 or 2.

132 Effect of designation

(1) A designated person does not have leave to enter or remain in the United Kingdom.

(2) For the purposes of a provision of the Immigration Acts and any other enactment which concerns or refers to immigration or nationality (including any provision which applies or refers to a provision of the Immigration Acts or any other enactment about immigration or nationality) a designated person—

(a) is a person subject to immigration control,

(b) is not to be treated as an asylum-seeker or a former asylum-seeker, and

(c) is not in the United Kingdom in breach of the immigration laws.

(3) Despite subsection (2)(c), time spent in the United Kingdom as a designated person may not be relied on by a person for the purpose of an enactment about nationality.

(4) A designated person—

(a) shall not be deemed to have been given leave in accordance with paragraph 6 of Schedule 2 to the Immigration Act 1971 (c. 77) (notice of leave or refusal), and

(b) may not be granted temporary admission to the United Kingdom under paragraph 21 of that Schedule.

(5) Sections 134 and 135 make provision about support for designated persons and their dependants.

133 Conditions

(1) The Secretary of State or an immigration officer may by notice in writing impose a condition on a designated person.

(2) A condition may relate to—

(a) residence,

(b) employment or occupation, or

(c) reporting to the police, the Secretary of State or an immigration officer.

(3) Section 36 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c. 19) (electronic monitoring) shall apply in relation to conditions imposed under this section as it applies to restrictions imposed under paragraph 21 of Schedule 2 to the Immigration Act 1971 (with a reference to the Immigration Acts being treated as including a reference to this section).

(4) Section 69 of the Nationality, Immigration and Asylum Act 2002 (c. 41) (reporting restrictions: travel expenses) shall apply in relation to conditions imposed under subsection (2)(c) above as it applies to restrictions imposed under paragraph 21 of Schedule 2 to the Immigration Act 1971.

(5) A person who without reasonable excuse fails to comply with a condition imposed under this section commits an offence.
(6) A person who is guilty of an offence under subsection (5) shall be liable on summary conviction to—
(a) a fine not exceeding level 5 on the standard scale,
(b) imprisonment for a period not exceeding 51 weeks, or
(c) both.
(7) A provision of the Immigration Act 1971 (c. 77) which applies in relation to an offence under any provision of section 24(1) of that Act (illegal entry etc.) shall also apply in relation to the offence under subsection (5) above.
(8) In the application of this section to Scotland or Northern Ireland the reference in subsection (6)(b) to 51 weeks shall be treated as a reference to six months.

134 Support
(1) Part VI of the Immigration and Asylum Act 1999 (c. 33) (support for asylum-seekers) shall apply in relation to designated persons and their dependants as it applies in relation to asylum-seekers and their dependants.
(2) But the following provisions of that Part shall not apply—
(a) section 96 (kinds of support),
(b) section 97(1)(b) (desirability of providing accommodation in well-supplied area),
(c) section 100 (duty to co-operate in providing accommodation),
(d) section 101 (reception zones),
(e) section 108 (failure of sponsor to maintain),
(f) section 111 (grants to voluntary organisations), and
(g) section 113 (recovery of expenditure from sponsor).
(3) Support may be provided under section 95 of the 1999 Act as applied by this section—
(a) by providing accommodation appearing to the Secretary of State to be adequate for a person's needs;
(b) by providing what appear to the Secretary of State to be essential living needs;
(c) in other ways which the Secretary of State thinks necessary to reflect exceptional circumstances of a particular case.
(4) Support by virtue of subsection (3) may not be provided wholly or mainly by way of cash unless the Secretary of State thinks it appropriate because of exceptional circumstances.
(5) Section 4 of the 1999 Act (accommodation) shall not apply in relation to designated persons.
(6) A designated person shall not be treated—

(a) as a person subject to immigration control, for the purposes of section 119(1)(b) of the 1999 Act (homelessness: Scotland and Northern Ireland), or
(b) as a person from abroad who is not eligible for housing assistance, for the purposes of section 185(4) of the Housing Act 1996 (c. 52) (housing assistance).

135 Support: supplemental

(1) A reference in an enactment to Part VI of the 1999 Act or to a provision of that Part includes a reference to that Part or provision as applied by section 134 above; and for that purpose—
(a) a reference to section 96 shall be treated as including a reference to section 134(3) above,
(b) a reference to a provision of section 96 shall be treated as including a reference to the corresponding provision of section 134(3), and
(c) a reference to asylum-seekers shall be treated as including a reference to designated persons.
(2) A provision of Part VI of the 1999 Act which requires or permits the Secretary of State to have regard to the temporary nature of support shall be treated, in the application of Part VI by virtue of section 134 above, as requiring the Secretary of State to have regard to the nature and circumstances of support by virtue of that section.
(3) Rules under section 104 of the 1999 Act (appeals) shall have effect for the purposes of Part VI of that Act as it applies by virtue of section 134 above.
(4) Any other instrument under Part VI of the 1999 Act—
(a) may make provision in respect of that Part as it applies by virtue of section 134 above, as it applies otherwise than by virtue of that section, or both, and
(b) may make different provision for that Part as it applies by virtue of section 134 above and as it applies otherwise than by virtue of that section.
(5) In the application of paragraph 9 of Schedule 8 to the 1999 Act (regulations: notice to quit accommodation) the reference in paragraph (2)(b) to the determination of a claim for asylum shall be treated as a reference to ceasing to be a designated person.
(6) The Secretary of State may by order repeal, modify or disapply (to any extent) section 134(4).
(7) An order under section 10 of the Human Rights Act 1998 (c. 42) (power to remedy incompatibility) which amends a provision mentioned in subsection (6) of section 134 above may amend or repeal that subsection.

136 End of designation

(1) Designation lapses if the designated person—

(a) is granted leave to enter or remain in the United Kingdom,
(b) is notified by the Secretary of State or an immigration officer of a right of residence in the United Kingdom by virtue of the Community treaties,
(c) leaves the United Kingdom, or
(d) is made the subject of a deportation order under section 5 of the Immigration Act 1971 (c. 77).
(2) After designation lapses support may not be provided by virtue of section 134, subject to the following exceptions.
(3) Exception 1 is that, if designation lapses under subsection (1)(a) or (b), support may be provided in respect of a period which—
(a) begins when the designation lapses, and
(b) ends on a date determined in accordance with an order of the Secretary of State.
(4) Exception 2 is that, if designation lapses under subsection (1)(d), support may be provided in respect of—
(a) any period during which an appeal against the deportation order may be brought (ignoring any possibility of an appeal out of time with permission),
(b) any period during which an appeal against the deportation order is pending, and
(c) after an appeal ceases to be pending, such period as the Secretary of State may specify by order.

137 Interpretation: general
(1) This section applies to sections 130 to 136.
(2) A reference to a designated person is a reference to a person designated under section 130.
(3) “Family” shall be construed in accordance with section 5(4) of the Immigration Act 1971 (c. 77) (deportation: definition of “family”).
(4) “Right of abode in the United Kingdom” has the meaning given by section 2 of that Act.
(5) “The Refugee Convention” means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and its Protocol.
(6) “Period of imprisonment” shall be construed in accordance with section 72(11)(b)(i) and (ii) of the Nationality, Immigration and Asylum Act 2002 (c. 41).
(7) A voucher is not cash.
(8) A reference to a pending appeal has the meaning given by section 104(1) of that Act.
(9) A reference in an enactment to the Immigration Acts includes a reference to sections 130 to 136.

Asylum Policy Instruction
Restricted leave

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Contents

Section 1: Introduction

1.1 Purpose of instruction

1.1.1 This guidance explains the circumstances in which the Home Office will consider granting restricted leave to individuals who cannot be removed because this would breach their rights under the European Convention on Human Rights (ECHR) and:

- are excluded from the Refugee Convention for Article 1F reasons, or who would be excluded were a Convention reason to apply (i.e. those excluded from a grant of Humanitarian Protection), or
- have been refused asylum under Article 33(2) of the Refugee Convention

1.1.2 The instruction provides specific guidance on:

- the categories of persons who may be granted restricted leave under this policy;
- the duration of leave and conditions that may be attached to any grant of restricted leave;
- conducting an active review in cases granted restricted leave.

1.1.3 This instruction must be read in conjunction with the asylum policy instructions, Exclusion under Article 1F of the Refugee Convention, Cancellation, Cessation and Revocation of Refugee Status and Considering the protection (asylum) claim and assessing credibility.

1.1.4 This updates and replaces the interim casework instruction on restricted leave issued on 28 May 2012.

1.2 Background

1.2.1 There may be circumstances in which asylum seekers have committed war crimes, crimes against humanity, serious non-political crimes outside the country of refuge or acts contrary to the purposes and principles of the United Nations, or who are a danger to national security or are otherwise non-conducive to the public good. This includes those who espouse extremist views. For more information, see Exclusion under Article 1F of the Refugee Convention. Exclusion may either be agreed by Special Cases Unit (SCU, in OSCT) or may be imposed following an allowed appeal.

1.2.2 Our policy is to remove such individuals wherever possible because they are not welcome in the UK. However, in cases where removal cannot currently be enforced for ECHR reasons we will deny the benefits of refugee status and Humanitarian Protection and instead grant a short period of restricted leave to which tight restrictive conditions may be attached according to the particular circumstances of each case.

1.2.3 This policy applies to anyone where there is an ECHR barrier to removal, including country situations which meet the Article 15(c) threshold or where the person would ordinarily qualify for discretionary leave because they are in the terminal stages of illness and removal meets the very high Article 3 threshold established by case law. Such individuals must not be granted Humanitarian Protection or discretionary leave but placed on restricted leave in accordance with this policy.

1.2.4 As those who fall within the scope of this policy have committed serious international crimes and/or represent a danger to the security of the UK, only Article 3 considerations will normally outweigh the public interest in removing them because it is an absolute right and the extent of the public interest cannot be taken into account. Where qualified rights are engaged, such as Article 8 ECHR, only in the most compelling compassionate circumstances could their family or private life, or medical considerations, outweigh the public interest in removal in these cases. It is expected there will be very few such cases, but where there are such cases this policy applies.

1.2.5 Such cases will be reviewed regularly with a view to removal as soon as possible and only in exceptional circumstances will individuals on restricted leave ever become eligible for settlement or citizenship. Such exceptional circumstances are likely to be very rare.

1.3 Policy intention behind Restricted Leave

1.3.1 The policy objectives in excluding individuals from the Refugee Convention and/or refusing asylum or Humanitarian Protection and instead granting shorter periods of restricted leave with specific conditions is for:

- **Public interest**. The public interest in maintaining the integrity of immigration control justifies frequent review of these cases with the intention of removing at the earliest opportunity. Therefore we want to ensure close contact and give a clear signal that the person should not become established in the UK.
- **Public protection**. It is legitimate to impose conditions designed to ensure that the Home Office is able to monitor where an individual lives and works and/or prevent access to positions of influence or trust.
- **Upholding the rule of law internationally**. The policy supports the principle that those excluded from refugee status, including war criminals, cannot establish a new life in the UK and supports our broader international obligations. It reinforces the message that our intention is to remove the individual from the UK as soon as is possible.

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1.4 Application in respect of children

1.4.1 Some individuals who fall within this policy will have dependent children. In applying the policy the decision-maker must have regard to the need to safeguard and promote the welfare of children in the UK, as provided by section 55 of the Borders Citizenship and Immigration Act 2009. This means the decision-maker must have regard to the likely impact the imposition of any conditions may have on dependent children and consider what is appropriate in that particular case. The published guidance on the section 55 duty can be found here: Section 55 Children's Duty Guidance.

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Section 2: Legal Framework

2.1 Refugee Convention

2.1.1 Article 1F of the Refugee Convention excludes certain individuals from the protection of the Convention where there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

2.1.2 Article 33(2) of the Refugee Convention provides for the refusal of asylum where there are reasonable grounds for regarding someone as a danger to the security of the host state or where someone has been convicted of a particular serious crime and constitutes a danger to the community.

2.2 Immigration Act 1971

2.2.1 The power to attach conditions to leave is provided by section 3(1)(c) of the Immigration Act 1971. A person who knowingly fails to observe a condition of their leave commits an offence by virtue of section 24(1)(b)(ii) of the 1971 Act. Where appropriate, this policy will be enforced by the prosecution of individuals who do not comply with the conditions of their leave.

2.3 Immigration Rules

2.3.1 Paragraph 334 (iii) and (iv) of the Immigration Rules provide for the refusal of asylum where there are reasonable grounds to consider that an individual is a danger to the security of the UK or an individual is a danger to the community having been convicted of a particularly serious crime. This transposes Article 33(2) of the Refugee Convention into the Immigration Rules.

2.3.2 Paragraph 339A provides for the cancellation, cessation or revocation of refugee leave if such evidence comes to light after asylum has been granted. These provisions are replicated in Paragraph 339G for those granted Humanitarian Protection

2.3.3 Paragraph 322(1C) of the Immigration Rules sets out when an application for indefinite leave to remain must be refused when the applicant has criminal convictions.

2.3.4 Paragraph 322(5) sets out that an application for a variation of leave to enter or remain (including a variation from limited to indefinite leave) should normally be refused if it is undesirable to permit the person concerned to remain in the United Kingdom in the light

of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security.

2.3.5 Paragraph 322(5A) sets out that an application for a variation of leave to enter or remain (including a variation from limited to indefinite leave) should normally be refused if it is undesirable to permit the person concerned to enter or remain in the United Kingdom because, in the view of the Secretary of State:

(a) their offending has caused serious harm; or
(b) they are a persistent offender who shows a particular disregard for the law.

2.3.6 For further guidance on the general grounds for refusal in Part 9 of the Immigration Rules, please see General grounds for refusal. Officials should ensure they are familiar with the rest of the general grounds as there may be other grounds which will apply in an individual case.

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Section 3: Categories Granted Restricted Leave

Restricted leave can be imposed in the following categories of case:

3.1 Those excluded under Article 1F of the Refugee Convention

3.1.1 The purpose of Article 1F is to deny the benefits of refugee status to those who do not deserve international protection because there are serious reasons for considering that they committed war crimes, crimes against peace or humanity, serious non-political crimes or acts contrary to the purposes and principles of the United Nations. It is also designed to ensure that individuals cannot avoid being returned to their country of origin to be held to account for their actions. Article 1F is intended to protect the integrity of the asylum process. See Exclusion under Article 1F of the Refugee Convention for detailed guidance on applying exclusion clauses in asylum decision-making.

3.1.2 Those who are refused asylum because Article 1F applies must be prioritised for enforcement action and removal. Where they cannot be removed because this would be contrary to the UK's obligations under the ECHR they should be granted restricted leave under this policy until we are legally able to enforce removal.

3.2 Those excluded from Humanitarian Protection

3.2.1 Paragraph 339D of the Immigration Rules sets out when an individual will be excluded from Humanitarian Protection. The reasons mirror those provided in Article 1F of the Refugee Convention and the guidance above in section 3.1 also applies to those excluded from Humanitarian Protection.

3.3 Those refused under Article 33(2) of the Refugee Convention

3.3.1 Article 33(2) provides for the refusal of asylum to individuals who would otherwise be refugees where there are reasonable grounds for regarding them as a danger to the security of the UK. This includes those convicted of particularly serious crimes or those who espouse extremist views and behaviours.

3.3.2 Those who are refused under this provision but cannot be removed to their country of origin because this would be contrary to the UK's obligations under the ECHR should be granted restricted leave under this policy until we are legally able to enforce removal.

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Section 4: Administration of the Policy

4.1 Casework

4.1.1 All exclusion and restricted leave cases must be considered within Special Cases Unit (SCU).

4.2 Duration of leave

4.2.1 Restricted leave should in most instances be limited to a maximum of six months at a time to emphasise its short-term nature and because it would be at odds with the aim of this policy to permit such a person to re-enter the UK. If someone with leave for six months or less travels outside the UK, their leave will lapse. A grant of leave for longer than six months permits a person to leave the UK and to be readmitted during the validity of their grant of leave (by virtue of section 13(2)(b) of the Immigration (Leave to Enter and Remain) Order 2000).

4.2.2 All cases must be assessed individually. A shorter period than six months should be granted where removal appears to be reasonably likely within six months or where, in exceptional cases, the risk posed by the individual warrants the case being kept under review more frequently.

4.3 Recourse to public funds

4.3.1 Individuals placed on restricted leave will not have recourse to public funds unless they are destitute. For guidance on assessing destitution, and the evidence the individual must provide to make out a claim of destitution, see assessing destitution. The burden of proof is on the individual to show that they are destitute and in need of public funds.

4.4 Employment restriction (including referral to the Disclosure and Barring Service)

4.4.1 The presumption is that permission to work will normally be restricted rather than denied outright where any condition is imposed. Any employment restriction also applies to voluntary work, self-employment or engagement in any kind of business, paid or unpaid. The type of restriction imposed must be in proportion to the public protection risk posed by the individual. The options for restricting employment are:

(i) Imposing a requirement to notify the Secretary of State of all employment and volunteering roles

This should be used for lower-risk cases so that the Home Office can notify other agencies, where appropriate, about the person's employment. Individuals should normally be required to notify the Home Office within 14 days of a change in their employment circumstances (for example taking a new role or leaving a position).

(ii) Applying restrictions on working, including in certain occupations/professions

Generally, this will be expressed as a condition not to take any employment or engage in any business unless the Secretary of State has given prior consent in writing. When consent is sought for a particular job, the precise type of work to be restricted will

depend entirely on the risk factors posed in individual cases. The condition should generally be used to prevent the person from working in roles with unsupervised contact with vulnerable people, or in roles which could be inappropriate according to the alleged crimes or acts for which the individual is being excluded, e.g. working with migrant communities from the country of origin where war crimes were allegedly committed. If an individual is already in employment then details of that employment must be obtained and an assessment undertaken as to its continuing suitability prior to a grant of restricted leave.

(iii) A total ban on employment in any capacity, whether paid or as a volunteer

This should be used exceptionally in cases posing a particularly high public protection risk. Such cases must also be referred to the local police force for handling under the Potentially Dangerous Person (PDP) regime.

Operation of the employment restriction

4.4.2 At the initial grant of leave, and at subsequent renewals, the Immigration Status Document / Biometric Residence Permit (BRP) will in most instances be completed with a remark indicating that employment is permitted only with the consent of the Secretary of State. This must be accompanied by a letter explaining that consent will normally only be given in relation to a specific job or business activity. Where the individual seeks to change their employment, or to take up an additional role, they must apply for fresh consent.

4.4.3 An individual may apply for consent either in writing to the designated decision-maker or at a reporting event (where under a condition to report to the Secretary of State). In either case the individual must provide the following details to enable a decision to be made:

- Name, address, contact details of employer;
- Job title / position and job advertisement (if applicable);
- Person specification for the role (if applicable);
- Details of role and responsibilities.

4.4.4 All requests for permission to work should be dealt with as soon as possible (usually with 14 days) after the request is made. The individual should be told that his request will be submitted to the decision-maker and the decision will be notified in writing to their home address, with a copy sent to their legal representatives (where applicable). It is important that the response is sent to the notified home address as this is a way of checking that the individual continues to live at the address given. The individual must also be notified of the requirement to update his BRP, because employers are not allowed to accept a Home Office letter as proof of permission to work.

4.4.5 In considering whether to give consent to proposed employment, decision-makers must revisit the case background to make a judgement on whether previous behaviour suggests the person would be unsuitable for the proposed role in a UK context. The decision-maker must pay particular attention to unsuitable behaviour that occurred when the person previously held:

- a position of authority over others (e.g. police, teacher, security guard, soldier);
- a position of trust (e.g. doctor, nurse);
- a role allowing unsupervised access to children or vulnerable people;

- a professional role that involved working unsupervised to a significant degree or instructing/supervising others.

4.4.6 The presumption is that a person excluded from the Convention under Article 1F, excluded from Humanitarian Protection or refused under Article 33(2) should not be permitted to work or volunteer in any of the roles that require a standard or enhanced DBS check. These include (not an exhaustive list):

- healthcare, e.g. doctors, nurses, chiropractors, opticians;
- roles involving the humane killing of animals;
- public sector roles e.g. police, court, prison and probation services;
- roles requiring contact with children e.g. teaching and training roles or foster carers;
- roles in the legal profession, including immigration advisers; and
- other miscellaneous roles e.g. locksmiths, taxi drivers, security guards.

4.4.7 Further information is available at: Disclosure and Barring Service: Services and guidance.

Disclosure and Barring Service (DBS) Referral Process

4.4.8 Regardless of the employment condition being imposed, all cases excluded from the Convention under Article 1F, excluded from Humanitarian Protection or refused under Article 33(2) must be referred to the DBS as soon as an individual is granted restricted leave with any employment condition.

4.4.9 The referral to DBS must include information relevant to the case, including the serious reasons for considering the individual has committed crimes/offences that led to the exclusion under Article 1F or refusal under Article 33(2). This would normally be the asylum decision letter or the Tribunal appeal determination, together with details of the restrictions being applied. It should not be the interview transcript, except on request by the DBS.

4.4.10 The DBS will consider whether it is appropriate to bar the person under their discretionary barring procedure. If the DBS is minded to bar the person, they will be invited by the DBS to make representations within eight weeks which will be considered before a final decision is taken on barring. The DBS may contact the Home Office about any representations received and will inform the Home Office of the decision, so that this may be taken into account if the individual seeks permission to take or engage in a particular form of employment.

Professional/regulatory bodies

4.4.11 Where the applicant seeks consent for employment in a role under the supervision of a professional body (other than the DBS), decision-makers must consider whether public protection is best served by disclosure of the details of the criminality or extremist behaviours to that professional body. This can be done even where the decision-maker is not proposing to refuse consent to employment in that role – informing a regulatory body can serve to ensure a person's behaviour at work is kept under supervision.

4.4.12 After making a referral, the decision-maker must request disclosure from the professional/regulatory body about the action taken in respect of the individual. Knowledge of how seriously the professional body regards the risk posed by the

individual may help to inform the precise nature of conditions that should be imposed by the Home Office, in particular the restrictions relating to employment.

Disclosure

4.4.13 Relevant information of alleged past criminality can be shared with the DBS or professional and statutory regulatory bodies, consistent with our obligations under the Data Protection Act 1998. Where in doubt about whether information can be disclosed decision-makers should seek advice from senior caseworkers or a chief caseworker in the first instance.

4.5 Residence restrictions

4.5.1 These cases remain a priority for removal so decision-makers must maintain contact with individuals to ensure removal action is pursued as soon as possible. A requirement to notify officials of a change of address is essential to ensure that the individual can be located when removal is possible. Requiring the person to live in a specific area where the accommodation is publicly provided or funded may also be legitimate to reduce the cost of providing housing.

4.5.2 One or both of the following residence conditions should usually be imposed:

- to notify the Secretary of State of the home address and any change of address; and/or
- to seek the prior consent of the Secretary of State to any change of address.

4.5.3 The first option, to notify the Secretary of State of changes of address, should normally be imposed in all cases. In cases requiring the additional condition in the second option, the individual will be subject to a requirement to seek the consent of the Secretary of State before changing address. This condition will be on the face of the Immigration Status Document/Biometric Residence Permit and must be explained in an accompanying letter. It is important that requests for consent to change address are dealt with promptly as the person, including their family, may have to change address and should not be left homeless or in breach of conditions.

4.5.4 In deciding whether to give consent, decision-makers must have regard to known risk factors and seek advice from partners (e.g. police, local authorities) where appropriate. If specific risk factors are known, it may be appropriate to advise the individual that he will not be given permission to live within a certain area.

4.5.5 In this section, 'residence' should be given the meaning of habitual residence. A person subject to a residence condition may also be subject to conditions such as:

- not spending more than three consecutive nights away from the address without the prior written consent of the Secretary of State; and
- not spending more than 10 nights away from that address in any rolling six month period.

These conditions must be specified in the notice explaining the conditions attached to the leave.

4.5.6 Each case must be considered on the individual facts and risks. Particular risks may arise where:

- the individual concerned may pose particular risks to individuals in the community on the basis of past behaviour – for example, the Home Office may want to prohibit residence close to a school or other facility;
- there is a significant community from the applicant's country of origin in that locality. The risk may be to the individual (e.g. from members of the community seeking retribution), or there may be a general public order risk if it becomes known that the person is living in the community. It also may be suspected that an excluded individual will seek to use his influence within the community to intimidate others or to exert undue influence. Where that is a real concern, the individual should be informed that permission will not be granted to live at an address within a specified area.

4.5.7 A residence restriction may also be imposed where it would facilitate the progression of the individual to removal.

4.5.8 In cases that pose a particularly high risk of public order or crime, the local police should be informed as part of the Potentially Dangerous Person (PDP) regime.

4.5.9 A residence condition may have an adverse impact on child dependants. Where a child lives within the household of the excluded person, care should be taken to consider the impact on the child's welfare in accordance with the Home Office's s.55 duty. An example of this might be where a residence condition disrupts a child's education at a crucial stage, or where it takes the child away from an extended family. Removing a child from the influence of a wider community may not be in the best interests of the child. A view may be sought from the Office of the Children's Champion (OCC) about child welfare issues.

Compliance

4.5.10 Any letter or notice setting out the basis of the leave given should make clear the consequences of non-compliance. Decision-makers must keep compliance with conditions under close review. They must liaise with reporting centres to use the reporting event as a means of monitoring compliance with any residence and employment conditions.

4.5.11 Decision-makers must maintain contact with reporting centre staff and request that they are vigilant to signs that a person is no longer complying with conditions. An example of this might be if they consistently arrive late for reporting events and their explanation does not stand up to scrutiny, for example, if their travel tickets consistently show they have travelled to the reporting event from a location other than their notified address.

4.5.12 Decision-makers should ask reporting centres to request evidence of recent utility bills or other evidence that corroborates the stated address. Reporting centre staff can also ask to see return bus or train tickets where the individual does not live within walking distance of the reporting centre or has not driven there.

4.5.13 Where there are doubts about a person's compliance with conditions, the decision-maker should contact the local Immigration, Compliance and Engagement (ICE) team

to commission an investigation, which may include a home visit. In some cases it may be appropriate to make a referral to an intelligence team to establish if there is evidence of a person living elsewhere, in breach of the residence condition. In the case of high harm individuals decision-makers may need to make other arrangements on a case-by-case basis.

4.5.14 Decision-makers should also consider the use of random home visits even where there is no obvious evidence of a breach of this condition. This can be justified, given the high priority of these cases for removal, in order for the Home Office to have confidence that it is maintaining contact.

4.6 Reporting restrictions

4.6.1 The presumption is that **all** cases subject to this policy will be made subject to a condition to report regularly to the Secretary of State. This condition is designed to maintain contact with the individual and monitor compliance with other conditions. Contact management is a priority because these cases must remain under review for removal at the earliest possible stage. The precise frequency and location of the reporting event will depend upon the following factors:

- the imminence of removal;
- the perceived risk of absconding;
- the need to maintain contact with the individual to monitor compliance with conditions;
- the impact of the reporting requirement on the individual taking into account:
  - the location of the reporting centre;
  - health and mobility;
  - domestic responsibilities;
  - employment.

4.6.2 The frequency with which an individual will be required to report will depend on the individual circumstances of the case. As a guide, monthly reporting should be considered the normal standard for restricted leave cases, but the appropriate period should be determined depending on the circumstances of each case. This frequency can also be modified up or down in the light of changing circumstances, taking into account the factors specified above. Where, in exceptional circumstances, it would be unreasonable to expect the individual to report each time in person, other options should be considered, such as home visits.

4.6.3 Before setting up the reporting regime, decision-makers must liaise with the relevant reporting centre manager to ensure they are aware of the facts relating to the individual, and in particular any risks they may pose when reporting. The reporting centre manager may wish to suggest an alternative reporting venue or specify a time when known victims or people at risk will not also be reporting.

4.6.4 An individual may apply for the condition to be varied, to take account of domestic or other commitments. Such requests should be considered in line with the overall aims of the policy and this guidance and, if appropriate, the condition should be amended in writing.

4.6.5 Decision-makers should be aware that asylum seekers supported under section 95 will cease to be eligible for support when their claim is determined. In this scenario, the

reporting condition should be set for the current address and then amended when the individual finds an alternative address. During this period it is important to maintain contact with the individual so that proposed addresses can be considered before the applicant needs to move into the new accommodation.

Compliance

4.6.6 Through liaison with the reporting centre, and monitoring of the case on Home Office records, the case owner should ensure compliance with the reporting condition. Where an individual breaches the reporting condition without explanation, the case owner should liaise with Immigration Enforcement to arrange an enforcement visit to establish the reason for the breach and to take appropriate action, which may, for example, include consideration of tightening conditions of the Restricted Leave or prosecution under the Immigration Act 1971 for failure to comply with conditions of leave.

4.6.7 In imposing the reporting condition, the individual should be told in writing of how to notify the reporting centre in the event that he is unable to attend a scheduled reporting event.

4.6.8 These cases are amongst the highest priority cases for compliance action. Any more than one notified failure to report must be followed up by the case owner. Missed reporting events without satisfactory explanation should be referred to the local prosecution team for consideration.

4.7 Restrictions on studies

4.7.1 Grants of restricted leave should generally be subject to a condition which prevents them from undertaking a course of study, whether by attending in person or remote learning.

4.7.2 These individuals are in the UK on a temporary form of leave, pending their removal from the UK when circumstances permit. The rationale for restricting study is that it underlines the temporary nature of the leave. It also reduces pressure on public finances and, for privately funded courses, ensures that the person does not occupy course spaces that would otherwise be taken up by British Citizens or lawful migrants. It is also in the wider public interest to ensure that migrants who are welcome in the UK are afforded the opportunities that come from education, ahead of those on restricted leave.

4.8 Authority levels/oversight

4.8.1 All proposed initial grants of restricted leave, and ‘conversions’ from Discretionary Leave to restricted leave following an active review (see section 4.9 below) must be approved by the Head of SCU.

4.8.2 There is a need to ensure that conditions of leave are being imposed in a consistent and proportionate manner, and are properly addressing the aims of the policy. This approval mechanism is intended to establish an appropriate overview of the types of conditions being used. and to ensure that good management information is collated.

4.9 The grant of Restricted Leave with conditions

4.9.1 The reasons for and nature of the conditions being imposed must be clearly explained in the letter and notices accompanying the grant of leave to remain. This letter must include the precise meaning of the conditions, how to apply to vary the conditions and a statement that a failure to comply with conditions may result in prosecution.

4.9.2 Where dependants have not made a protection claim in their own right, but were included as dependants of the main applicant before a decision was made, they should be granted leave in line with the main applicant. It is generally not appropriate to impose similar restrictions as apply to the main applicant. The restrictions applied should be at the minimum level necessary to maintain contact with the individual.

4.10 Active reviews

4.10.1 Grants of restricted leave will normally fall for renewal every six months. It remains the responsibility of the individual to apply for further leave to remain, but decision-makers must proactively review the case in good time before the expiry of the leave to re-assess any protection needs and the prospects of removal. In many cases, the country situation will not have changed sufficiently to make removal possible within the next review period, but this must always be checked against the most recent country information, such as Country of Origin Information Service (COIS) reports. In this scenario, decision-makers should seek information either in writing or via a reporting event about the person's work and future intentions and, on application consider a further grant of restricted leave in line with this policy. At the active review stage decision-maker should also review whether the conditions attached to the leave remain appropriate.

4.10.2 Where the circumstances have changed to the extent that the individual's removal would not be in breach of our ECHR obligations, the individual should be refused further leave and appeal rights notified in the usual way and, subject to those appeal rights, progressed to removal.

4.10.3 Cases which were granted Discretionary Leave before 2 September 2011 should remain on their existing leave until it falls for renewal. When the renewal application is received, the case should be transferred to the Special Cases Unit to be considered in line with this policy and, if removal is not an option, be granted restricted leave with appropriate conditions unless exceptional circumstances justify departure from the published policy. This may mean that conditions are placed on who have not been subject to conditions before, for example they may have not had any restrictions on their employment. Reasons for imposing new conditions must be explained in the decision letter and the proportionality of them should be considered in the light of the risk the person presents and their compliance with Home Office requirements during previous periods of limited leave.

4.10.4 All initial grants of restricted leave following a previous grant of Discretionary Leave should be approved by the Head of SCU. Subsequent renewals require approval for the grant of further restricted leave at an appropriately senior level but do not need Head of SCU approval unless the case is high profile or a significant change to the conditions or duration of leave is proposed.

4.10.5 Decision-makers should refer to section 83 of the Nationality, Immigration and Asylum Act 2002 when granting any form of limited leave to remain to failed asylum seekers. Grants of limited leave to remain (including restricted leave) which post-date the refusal of asylum may trigger a right of appeal under this provision, if leave to enter or remain exceeding one year has been granted (whether in one block, or in aggregate), unless they have already had a right of appeal against the refusal of asylum. Decision-makers must ensure that the correct paperwork is served in these cases.

4.11 Appeal rights exhausted failed asylum seekers

4.11.1 The instructions above relate to the handling of Article 1F and Article 33(2) cases who cannot be removed for legal reasons. Those who are refused asylum because Article 1F applies and there are no ECHR or other legal barriers to their removal must be prioritised for enforcement action.

4.11.2 Pending removal, these individuals should be on bail/temporary admission/temporary release as appropriate. It is essential that the bail conditions imposed in these cases effectively replicate the conditions that would be attached were a person to fall within this policy. Decision-makers should impose the same restrictions that they would impose with a grant of leave to remain. The only differences are that employment is prohibited and reporting would ordinarily be more frequent than monthly.

4.12 Applications for indefinite leave to remain

4.12.1 Those excluded from the Refugee Convention and/or Humanitarian Protection may make applications for indefinite leave to remain on the basis of long residence, for example because they have lived in the UK lawfully for 10 years or more. The requirements are at paragraph 276B of the Immigration Rules. Consideration must be given to all the factors listed in paragraph 276B(ii) and in particular consideration must be given to the person's conduct which led to them being excluded from the Refugee Convention and/or Humanitarian Protection when looking at character, conduct and associations under paragraph 276B(ii)(c). Usually, given our international obligations to prevent the UK from becoming a safe haven for those who have committed very serious crimes, the conduct will mean that the application should be refused, but decisions must be taken on a case-by-case basis.

4.12.2 Consideration must be given to each of the general grounds for refusal under paragraph 276B(iii). Paragraph 322(1C) sets out the grounds for refusing indefinite leave to remain where a person has a criminal conviction. For the purposes of this rule, the conviction does not have to be a UK conviction, but any overseas conviction must be for an offence which has an equivalent in the UK. For example, overseas convictions for homosexuality or proselytising would be disregarded. Consideration must also be given to the rest of the general grounds for refusal at paragraph 322.

4.12.3 Excluded individuals may seek to rely on N, R (on the application of) v Secretary of State for the Home Department [2009] EWHC 1581 in which it was held at paragraphs 21 and 22:

"This policy relating to those who are not within the protection of the Refugee Convention because of Article 1F(b) seems to me to be entirely reasonable. The rationale behind it I have not had spelled out before me, but it seems obvious that what is desired is to keep open the possibility of return and the need to consider at regular

and relatively short intervals whether return can be effected because, as a general approach, those who would not qualify because of the commission of a serious offence should not generally be considered to be able to remain within this country. One can understand why that policy has been adopted.

Accordingly, in principle, to award only six months is not in the least unreasonable. But the policy has, as it were, a cap. It is recognised that there will come a time when - provided the individual has behaved himself in this country - it would be proper to regard him as having put behind him, as it were, the original offending. Thus if someone has been here for ten years and subjected to a series of discretionary leaves for that period he will normally be able to remain here indefinitely. He will, after all, be expected by then to have made his life in this country, to have settled here, perhaps to have established family life here. The view is, again as it seems to me, entirely reasonably taken that generally speaking – and of course each case has to be considered on its own merits – such an individual will have leave to remain indefinitely and thus will be entitled to settle here."

4.12.4 Decision-makers must carefully consider the facts of an individual case against the specific facts in the case of R on the application of N to determine whether they are analogous and whether the principles set out in that case are applicable to the case under consideration.

4.12.5 Where a person does not qualify for indefinite leave to remain, consideration must be given to whether there continues to be an ECHR barrier to removal. If there is not, then the case must be prioritised for removal. If there is, then the person must be granted restricted leave within the terms of this policy.

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Section 5: Change Record

Version	Author(s)	Date	Change References
1.0	Criminality Policy / Asylum Policy	23 January 2014	First draft. Updated and revised to incorporate interim guidance (issued on 28 May 2012) and publish as rebranded policy.

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Asylum Policy Instruction
Discretionary Leave

Version 7.0

Published: 18 August 2015

Contents

Section 1: Introduction

1.1 Purpose of instruction

This guidance explains the limited circumstances in which it may be appropriate to grant Discretionary Leave (DL) and applies in both asylum and non-asylum cases applying from within the UK. DL cannot be applied for from abroad. It is intended to cover exceptional and compassionate circumstances and, as such, should be used sparingly.

DL is granted outside the Immigration Rules in accordance with Home Office policy set out in this instruction. It must not be granted where a person qualifies for asylum or humanitarian protection (HP) or for family or private life reasons.

Asylum caseworkers must read this guidance in conjunction with other key guidance products, in particular Assessing credibility and refugee status, Gender issues in the asylum claim, Humanitarian Protection, Further Submissions, Exclusion, Restricted Leave, Appeals Guidance, and the Immigration Directorate Instructions in Chapter 8: Appendix FM: 1.0b Family and private life – 10 year route.

1.2 Background

The Immigration Rules are designed to cover the vast majority of circumstances in which migrants will be granted leave because they are entitled to remain in the UK. However, there are a small number of Home Office policies that recognise there may be individuals who do not meet the requirements of the Immigration Rules, but there are nonetheless exceptional and/or compassionate reasons for allowing them to remain here. There is a separate policy (not covered in this DL guidance) on when to grant leave to remain outside the rules for Article 8 reasons based on exceptional circumstances for those who fail to meet the family and private life Immigration Rules.

Although several concessions outside the rules have been closed and others have been brought inside the rules, most notably as part of the Points Based System, a small number of concessions continue to exist. The circumstances in which someone may be granted leave for exceptional (non-family or private life) reasons are covered either by the policy on Leave outside the Rules (LOTR) for non-Article 8 reasons or this DL instruction.

DL was introduced alongside HP in April 2003 to replace exceptional leave to remain (ELR) and was initially used to grant leave for Article 8 reasons where removal would breach our obligations under Article 8 of the European Convention on Human Rights (ECHR). However, following the implementation of the family and private life rules on 9 July 2012, DL should no longer be granted where the requirements of those rules in Appendix FM or paragraphs 276ADE(1) to 276CE are met or where LOTR should be granted for Article 8 reasons. Transitional arrangements apply to those granted DL for Article 8 reasons before 9 July 2012.

From 6 April 2013, the policy of granting DL to unaccompanied asylum seeking children ended. Leave for this group must now be considered in accordance with paragraphs 352ZC to 352ZF of the Immigration Rules and not under the DL policy.

1.3 Policy intention

The policy objective is to maintain a firm, but fair and efficient immigration system that generally requires those who do not meet the rules to leave the UK, but carefully considers exceptional and compassionate individual circumstances that may justify leave on a discretionary basis by:

- providing a mechanism to cover those few cases where it would, at the time leave is granted, be unjustifiably harsh to expect someone to leave or enforce their removal - it is intended to be used sparingly
- carefully considering evidence relating to exceptional compassionate circumstances raised as part of a protection claim to assess whether a grant of DL is appropriate
- granting limited leave appropriate to the individual circumstances but not more than 30 months unless there is compelling evidence to justify a longer period and ensuring that those granted DL generally do not benefit from a faster route to settlement than those who meet the Immigration Rules
- requiring all migrants granted leave to pay the appropriate fee or meet the appropriate fees exemption to extend that leave if they show that they continue to meet the relevant criteria, including failed asylum seekers (FAS)
- being clear that settlement is a privilege, not an automatic right, and that it is generally entirely appropriate for migrants wishing to stay in the UK permanently to complete a minimum period of continuous limited leave before being eligible to apply for settlement

1.4 Application in respect of children and those with children

The application of this guidance must take into account the circumstances of each case and the impact on children, or on those with children, in the UK. Section 55 of the Borders, Citizenship and Immigration Act 2009 places an obligation on the Secretary of State to take account of the need to safeguard and promote the welfare of children in the UK when carrying out immigration, asylum and nationality functions.

In practice, this requires a consideration to be made of the best interests of the child in decisions that have an impact on that child. This is particularly important where the decision may result in the child having to leave the UK, where there are obvious factors that adversely affect the child, or where a parent caring for the child asks us to take particular circumstances into account. All decisions must demonstrate that the child's best interests have been considered as a primary, but not necessarily the only, consideration. Caseworkers must be vigilant that a child may be at risk of harm and be prepared to refer cases immediately to a relevant safeguarding agency where child protection issues arise.

This applies whether the child is claiming in their own right or is dependent on a parent or guardian. The Home Office guidance on 'Processing asylum applications from children' and 'Every Child Matters – Change for Children' sets out the key principles to take into account in all cases involving a child in the UK.

In cases where it is considered appropriate to grant DL, caseworkers must also consider whether to exercise discretion in relation to the length of leave to be granted. This is because a decision about duration of leave granted outside the rules is an immigration function to which section 55 applies. The length of leave must be decided on the individual facts of the case. While a grant of 30 months' leave will generally be appropriate, leave may be granted for shorter or longer periods, including, in particularly compelling circumstances, indefinite leave to remain. Caseworkers must demonstrate they have had regard to the child's best interests when considering the type and length of leave granted following a decision to grant leave under the DL policy. See section 4 below for further guidance.

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Section 2: Relevant Legislation

2.1 Immigration Act 1971

The Secretary of State has the power to grant leave on a discretionary basis outside the Rules from her residual discretion under the Immigration Act 1971. Discretionary Leave (DL) is a form of leave to remain that is granted outside the Immigration Rules in accordance with this policy. Applications for DL cannot be made from outside the UK.

2.2 Immigration Rules

Part 8 of the Immigration Rules and Appendix FM cover applications relating to family members and Part 7 of the Immigration Rules covers private life considerations for those not liable to deportation. From 9 July 2012, DL is no longer granted for family or private life reasons though caseworkers must be aware that there will be cases where people were granted an initial period of DL on the basis of their Article 8 rights before 9 July 2012 and must refer to section 10: Transitional arrangements.

Part 9 of the Immigration Rules covers the General Grounds for Refusal (GGfR) and must be consulted and applied before DL is granted.

Part 11 of the Immigration Rules cover applications for asylum and humanitarian protection. When considering such claims caseworkers must also consider any evidence provided about exceptional circumstances under this DL policy if the individual is refused protection.

Part 12 of the Immigration Rules contains provisions under paragraph 353B which are relevant to the application of the DL policy.

Part 13 of the Immigration Rules covers deportation orders and procedure and Article 8 (ECHR) in relation to deportation cases.

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Section 3: Reasons for granting DL

3.1 Key principles

Discretionary Leave (DL) must not be granted where an individual qualifies for leave under the Immigration Rules or for Leave outside the Rules (LOTR) for Article 8 reasons. It only applies to those who provide evidence of exceptional compassionate circumstances or there are other compelling reasons to grant leave on a discretionary basis.

DL should not be granted where another EU Member State (or Iceland, Norway, Switzerland or Liechtenstein) has accepted responsibility for an asylum claim under the Dublin arrangements or where an individual is otherwise removable on third country grounds. DL should not normally be granted to EEA nationals (or their family members) where they have free movement rights under EU law. See EEA and EU asylum claims.

It is not possible to cover all the circumstances in which DL may be appropriate because this depends on the totality of evidence available in individual cases but the following broad categories may apply:

3.2 Medical cases

This category applies to both asylum and non-asylum cases. Non-asylum medical cases must apply on the FLR (O) application form, available on Gov.UK. Where there is an ongoing asylum claim, caseworkers must consider any relevant medical issues in conjunction with that claim or as part of any further submissions raised.

An applicant seeking leave to remain on the basis of a serious medical condition may seek to rely on ECHR Article 3 and/or Article 8. In most circumstances, a person cannot rely on Article 3 to avoid return on the basis that they require medical assistance in the UK. The improvement or stabilisation in a person's medical condition resulting from treatment in the UK and the prospect of serious or fatal relapse on expulsion (ie deportation or removal from, or a requirement to leave, the UK) will not in themselves render expulsion inhuman treatment contrary to Article 3.

The threshold set by Article 3 is very high. To meet the threshold, a person will need to show that there are exceptional circumstances in their case which militate against return. Taken together, the relevant case law of D v United Kingdom [1997] 25 EHRR 423 and N v SSHD [2005] UKHL31 suggests that exceptional circumstances will arise when a person is in the **final stages** of a terminal illness, without the prospect of medical care or the support of family or friends or palliative care (ie relief of the pain, symptoms and stress caused by a serious illness and the approach of death) on return. The House of Lords' decision in N was upheld by the European Court of Human Rights in N v UK (2008) 47 EHRR 39, and recently affirmed by the Court of Appeal in GS (India) & Ors v The Secretary of State for the Home Department [2015] EWCA Civ 40, in which Lord Justice Laws confirmed the very high

threshold, stating that the case-law suggested that the 'exceptional' class of case is 'confined to deathbed cases' (paragraph 66).

The test established by N and D requires that caseworkers must make an assessment of whether the person's illness has reached such a critical stage (ie is a terminal illness and the person is close to death) that it would amount to inhuman treatment to deprive them of the care which they are currently receiving and send them home unless there is care available there to enable them to live their final days with dignity. Of particular relevance to this assessment will be whether:

- the person is critically ill at the point of decision
- there is any treatment available in the country of return (including palliative care)
- the person will be able to access such treatment as is available (although the fact that they are unlikely to be able to do so is not determinative)
- the person will have the support of family or friends on return

Exceptional circumstances might in principle arise in other contexts, but the Courts have made clear that the threshold is very high. If the person's condition or situation does not meet the Article 3 threshold, removal will not breach Article 3.

ECHR Article 8 may also be raised where a person is suffering from a medical condition. Article 8 deals with respect for private life, which includes a person's moral and physical integrity. The consequences to a person's physical or mental health of removing them from the UK can, in principle, engage Article 8.

However, in most cases concerning adults, the individual will not be able to rely on Article 8 to remain in the UK on the basis of their medical needs, unless there are other factors which engage Article 8 (for example, long residence or family ties in the UK). However, the medical condition and any treatment being received are relevant to a holistic Article 8 assessment where other family or private life matters are raised (e.g. private life, long residence, family ties in the UK). This does not mean that leave should be granted in these circumstances, simply that the condition and treatment must form part of the Article 8 proportionality assessment. The relevant case-law is MM (Zimbabwe) v SSHD [2012] EWCA Civ 279 and GS (India) & Ors v the SSHD [2015] EWCA Civ 40).

In addition, if the person is a 'health tourist' (someone whose medical condition existed before they came to the UK and who came here with the deliberate intention of seeking treatment for it) is likely to be relevant to the Article 8 assessment. In these circumstances, removal is likely to be proportionate. For further guidance refer to the instruction Human Rights on medical grounds.

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3.3 Other cases where return would breach the ECHR

This applies to asylum and non-asylum cases. Non-asylum cases making a standalone human rights claim must do so using the FLR (FP) or FLR (O) application form. Where there is an ongoing asylum claim, caseworkers must consider any other ECHR claims in conjunction with the asylum claim or as part of the further submissions. DL may be appropriate where the ECHR breach associated with return would not warrant a grant of humanitarian protection but where return would result in a flagrant denial of the right in question in the person's country of origin. For guidance on the consideration of other ECHR claims, see the Asylum Instruction on Considering Human Rights. It will be rare for return to breach another article of the ECHR in this way without also breaching Article 3.

3.4 Exceptional circumstances

This applies to asylum and non-asylum cases. A grant of DL may be appropriate following consideration under paragraph 353B of the Immigration Rules. This applies in cases where there are outstanding further submissions to be considered, but also where there are no outstanding further submissions, appeal rights are exhausted and the case is subject to a review at the removals stage. This may include those who have spent a significant period of time in the UK for reasons beyond their control after having claimed asylum, though such individuals are expected to provide evidence as to why they cannot leave voluntarily. Caseworkers must carefully consider whether a grant of leave is appropriate under paragraph 353B with reference to the Further Submissions guidance and Enforcement and Instructions Guidance (EIG) Chapter 53.

3.5 Modern Slavery cases (including trafficking)

Victims of slavery, servitude and forced and compulsory labour who are conclusively recognised as such by the National Referral Mechanism (NRM) may be eligible for DL based on the same criteria of personal circumstances, helping police with enquires and pursuing compensation as victims of human trafficking, and this provision applies across the UK.

A person will not normally qualify for DL solely because they have been identified as a victim of modern slavery or trafficking – there must be compelling reasons based on their individual circumstances to justify a grant of DL where they do not qualify for other leave such as asylum or humanitarian protection.

As part of the positive reasonable grounds decision letter issued by the Competent Authority of the NRM the potential victim of human trafficking in the UK, and modern slavery in England and Wales, will be asked if they would like to be considered for DL in the event of a positive conclusive grounds decision from the NRM. Where they indicate they would like to be considered for DL this will be considered under the criteria relating to personal circumstances, helping police with enquires and pursuing compensation detailed in the Competent Authority guidance once a positive conclusive grounds decision is issued. The person will not need to fill in an application form or pay a fee for an initial consideration of DL on this basis. A person who has claimed asylum will receive automatic consideration for DL on this basis if they are not granted asylum or humanitarian protection.

For further guidance on considering DL in modern slavery cases and for cases of modern slavery and human trafficking in Scotland and Northern Ireland see the Competent Authority guidance.

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3.6 Exclusion and criminality

In all asylum and non-asylum cases caseworkers must consider the impact of an individual's criminal history before granting any leave.

Where there are reasonable grounds for considering that the applicant should be excluded from asylum or humanitarian protection, caseworkers must refer to the guidance on Exclusion. From 2 September 2011, the Restricted Leave policy replaced grants of DL for those excluded from protection under Article 1F of the Refugee Convention. The restricted leave policy was updated in January 2015 to cover those refused under Article 33(2) of the Convention. Restricted leave may be granted in these circumstances where removal would breach our obligations under the ECHR. Article 1F cases granted DL before 2 September 2011 should remain on their existing leave until it falls for renewal. If a renewal application is received, it must be considered in line with the restricted leave policy instruction. Restricted leave can only be granted by the Special Cases Unit (SCU) or Criminal Casework. All cases involving exclusion or extremism must be referred to SCU and cases involving criminality where there is no SCU interest must be referred to Criminal Casework.

Where cancellation, cessation or revocation of refugee status or humanitarian protection is considered appropriate and the individual does not fall within the restricted leave policy it may be appropriate to grant DL. Caseworkers must refer to the guidance on Cancellation, Cessation and Revocation before considering a grant of leave on this basis.

Where an individual does not fall within the restricted leave policy (for example, where they are not excluded under Article 1F or the criminal sentence was less than 2 years' imprisonment), caseworkers must consider the impact of any criminal history before granting DL, having regard as appropriate to Part 9 (General Grounds for Refusal) and, where an individual is not liable to deportation, paragraph 353B(i) of the Immigration Rules. Criminals or extremists should not normally benefit from leave on a discretionary basis under this policy because it is a Home Office priority to remove them from the UK.

In cases where there are exceptional reasons for granting DL to someone with a criminal history who does not fall within the restricted leave policy, the duration of leave to be granted, up to 30 months, will depend on the individual circumstances of the case. Caseworkers must consider whether removal appears to be reasonably likely and the extent of any risk posed by the individual, which may justify keeping the case under more regular review, eg by granting 6 months' DL. Where DL is granted for 6 months or less, if the individual travels outside the UK their limited leave will lapse whereas leave granted for a longer period allows a person to leave the UK and be readmitted during the validity of their leave, by virtue of article 13(2)(b) of the Immigration (Leave to Enter and Remain) Order 2000.

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3.7 Other cases

This applies to asylum cases only. Caseworkers must refer to the Home Office policy on Leave outside the Immigration Rules for guidance on granting leave outside the Immigration Rules in non-asylum cases in scenarios not covered in the sections above.

The categories under which it would normally be appropriate to grant DL are set out above. There are likely to be very few other cases in which it would be appropriate to grant DL to a failed asylum seeker. However, it is not possible to anticipate every eventuality that may arise, so there remains scope to grant DL where individual circumstances, although not falling within the broad categories listed above, are so compelling that it is considered appropriate to grant leave.

However, the fact that an application fails to meet the requirements of the Immigration Rules for a grant of leave by a small margin (often called a near miss) or fails to meet only one of the requirements, is not in itself a reason to grant DL for compassionate reasons. Expressing a preference not to leave the UK is not a compassionate factor. The Immigration Rules made by the government and approved by Parliament regulate who may enter or stay in the UK as a matter of general policy. The fact that a person does not qualify in a particular category will generally by a deliberate consequence of that policy and caseworkers must not, when considering whether to grant DL for compassionate reasons, undermine those policy objectives.

Where a decision is made to grant DL for reasons not covered by the broad categories listed above, the caseworker must discuss the case with a senior caseworker. Detailed file minutes will be required to keep accurate records of what has been decided and why.

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3.8 Unaccompanied asylum seeking children

Where an unaccompanied child applies for asylum, decision makers must first consider whether they qualify for asylum, HP, or leave to remain on the basis of family or private life under Appendix FM or paragraph 276ADE(1) of the Immigration Rules (or LOTR for Article 8 reasons) and then DL on any other basis.

Where an unaccompanied child does not qualify for protection, it will normally be appropriate for the child to reunite with their family in their country of origin, provided that safe and adequate reception arrangements are in place and subject to an assessment of their best interests. Caseworkers must take into account the best interests of children as a primary consideration (although not necessarily the only consideration) when considering whether to grant leave. The starting point is that a child's best interests are likely to be best served by reuniting them with their family, unless there are protection needs or safeguarding concerns. Caseworkers must refer to the instruction '[Processing asylum applications from children]'.

Where an unaccompanied child qualifies for leave on more than one ground, they should normally be granted the leave that provides the longest period of stay. However, all grounds which informed the decision must be recorded in the file minute.

From 6 April 2013, the policy on granting limited leave to unaccompanied children refused asylum and humanitarian protection and where there are no adequate reception arrangements in the country to which they would be returned, was incorporated into paragraphs 352ZC to 352ZF of the Immigration Rules. Unaccompanied children who meet the requirements of these Rules are granted limited leave, normally for 30 months or until the applicant is 17.5 years of age, whichever was the shorter period.

Unaccompanied children who, prior to 6 April 2013, were granted DL due to the absence of adequate reception arrangements and who apply for further leave on this basis after the new rules came into force, must be considered under paragraphs 352ZC to 352ZF of the Immigration Rules. However, when considering an application for further leave under paragraphs 352ZC to 352ZF for those previously granted DL due to the absence of adequate reception arrangements, or for those who were previously granted leave under paragraphs 352ZC to 352ZF, caseworkers should also consider whether there are particularly compelling reasons in individual cases to grant a longer period of leave having regard to the best interests of the child. See section 5.3 below for further guidance.

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Section 4: Granting or refusing leave

4.1 Granting DL

Asylum claimants refused protection but granted DL must be issued with a 'Reasons for Refusal Letter (RFRL)' explaining why the asylum and HP claim has been refused and why they have not been granted leave on the basis of family or private life. The primary reasons for granting DL should also be set out briefly. These reasons do not need to be detailed, but it must be clear why DL has been granted. The letter to the claimant should briefly refer to the basis on which leave was granted.

If a person qualifies for DL under more than one heading listed in Section 3, they should benefit from the one that provides the longer period of leave so as not to disadvantage them. The letter does not need to refer to all the reasons for which they qualify for DL, but the consideration minute on file must show that each reason was considered.

4.2 Refusing DL

Asylum claimants who do not fall to be granted any leave must be refused, and reasons for the refusal should be clearly provided in the RFRL. For full details of how to refuse an asylum claim or further submissions, see Asylum Instructions on Assessing credibility and Refugee status and Further Submissions.

4.3 Recourse to public funds, work and study

Those granted DL have recourse to public funds and no prohibition on work. They are also able to enter higher education. However, those on limited leave are not eligible for higher education student finance under existing Department of Business, Innovation and Skills regulations. In addition, a study condition applies to all adult temporary migrants granted DL which prohibits studies in particular subjects without first obtaining an Academic Technology Approval Scheme (ATAS) clearance certificate from the Counter-Proliferation Department of the Foreign and Commonwealth Office (FCO). Those granted DL who are aged 18 or will turn 18 before their limited leave expires will, in addition to any other conditions which may apply, be granted leave subject to the requirements set out Part 15 in the Immigration Rules.

4.4 UK born children of parents granted DL

Children born in the UK to parents who both have DL and are not British Citizens should normally be granted limited leave in line with their parents. If only one parent has DL, the leave to be granted will depend on the status of the other parent. See Dependants and Former Dependents Instruction.

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Section 5: Duration of Discretionary Leave

Where DL is granted, the duration of leave must be determined by considering the individual facts of the case but leave should not normally be granted for more than 30 months (2 and a half years) at a time.

When a person is granted an initial period of DL, this does not necessarily mean they will be entitled to further leave or to settlement. Subsequent periods of leave may be granted providing the applicant continues to meet the relevant criteria set out in the published policy on DL applicable at the time of the decision.

From 9 July 2012, those granted DL must normally have completed a continuous period of at least 120 months' limited leave (i.e. a total of 10 years, normally consisting of 4 separate 2 and a half year periods of leave) before being eligible to apply for settlement. Separate arrangements exist for those granted an initial period of 3 years' DL prior to 9 July 2012. See section10 - Transitional Arrangements.

5.1 Exceptional circumstances

Where removal is no longer considered appropriate following consideration of the exceptional factors set out in paragraph 353B of the Immigration Rules and the guidance in Chapter 53 of the Enforcement Immigration Guidance (EIG), 30 months' DL should be granted, unless one of the following situations applies:

- where the UK Border Agency (as it was) made a written commitment that a case would be considered **either** before 20 July 2011 **or** before 9 July 2012, but failed to do so, and it is later decided that a grant is appropriate
- where the UK Border Agency (as it was) made a decision **either** before 20 July 2011 **or** before 9 July 2012 that a grant of leave on the grounds then listed in Chapter 53 was not appropriate, but after that date reconsidered that decision and – on the basis of the same evidence (ie the evidence available to the original caseworker) – it is decided that the earlier decision was wrong and leave should have been granted

Where the above applies and the relevant date was before 20 July 2011, Indefinite Leave to Remain (ILR) outside the rules should be granted. This is because before 20 July 2011 ILR was normally granted in cases which met the exceptional circumstances criteria in Chapter 53. Where the above applies and the relevant date was before 9 July 2012, three years' DL should be granted, with the person normally becoming eligible to apply for settlement after 2 periods of 3 years' DL (6 years' continuous leave). This is because from 20 July 2011 to 8 July 2012 the UK Border Agency (as it was) granted 3 years' DL in cases that met the exceptional circumstances criteria in Chapter 53.

If the caseworker considers that there are other exceptional, compelling reasons to depart from the policy of granting 30 months' DL, the case must be referred to a Senior Caseworker

for further consideration. In all other cases 30 months' (2.5 years') DL is normally the appropriate period of leave to grant.

5.2 Non-standard grant periods: shorter periods of stay or deferral of decision or removal

There may be some cases where it is clear from the individual circumstances of the case that the factors leading to DL being granted will be short lived. In such cases it may be appropriate to grant a shorter period of leave. Non-standard grants of less than 30 months should be used only where the information relating to the specific case clearly points to a shorter period being applicable. Reasons for granting a shorter period must be included in the letter to the applicant.

There will also be some cases where the factors meriting a grant of DL are expected to be sufficiently short lived that the question arises whether to grant a short period of leave or to refuse the claim outright whilst giving an undertaking not to remove the individual or expect them to leave the UK voluntarily until the circumstances preventing their return have changed. Such cases could arise at the decision-making stage or following an appeal. Where it is considered that return will be possible within 6 months of the date of decision, it will normally be appropriate to refuse the claim outright, not grant a period of DL and defer removal until such time as it is possible. If the caseworker considers that there are reasons to depart from the policy of granting 30 months' DL, the case must be referred to a senior caseworker for further consideration.

5.3 Non-standard grant periods: longer periods of stay

There may be cases where a longer period of leave is considered appropriate, either because it is in the best interests of a child (and any countervailing considerations do not outweigh those best interests), or because there are other particularly exceptional compelling or compassionate reasons to grant leave for a longer period (or ILR). In cases not involving children (as the main applicant or as dependants), there must be sufficient evidence to demonstrate that the individual circumstances of the case are not just unusual but can be distinguished to a high degree from other cases to the extent that it is necessary to deviate from a standard grant of DL under this policy.

In cases involving children, caseworkers must regard the best interests of the child as a primary consideration (although not necessarily the only consideration) and one that can affect the duration of leave granted. This does not alter the expectation that in most cases a standard period of 30 months' (2.5 years') DL will be appropriate, but it does mean that there may be cases where compelling evidence is available that justifies a longer period of leave (or ILR) to reflect the best interests of the individual child.

Factors such as the length of residence, whether the child was born in the UK and strong evidence to suggest that the child's life would be adversely affected by a grant of limited leave rather than ILR need to be weighed against the wider requirements to ensure a fair, consistent and coherent immigration policy, including the requirement for migrants generally to complete

a qualifying period of limited leave before being eligible to apply for settlement. For example, there may be cases where a child has a serious and chronic medical condition which may not be able to be treated in the country of return and it is considered in their best interests to grant ILR to the child to provide a greater degree of certainty for the purposes of their continued treatment or mental wellbeing.

An example of where it would not normally be appropriate to grant a child ILR may be because they would like to qualify for a student loan in order to go to university. This would not normally be a sufficiently exceptional or compelling reason without additional factors. Individuals in this position may be aged 18 or over and are not prevented from going to university by a grant of limited leave – rather they would not be eligible for a student loan. Some universities may have other funding which they could apply for, such as bursaries, scholarships or other types of support or fee waiver; likewise, some commercial companies and charities.

Higher education institutions also have discretion to treat an 'overseas' student as a home student and charge the home student tuition fee, which is usually lower. A grant of limited leave provides permission to work and individuals could choose to seek employment before they attend university, study part time and work part time to fund their course, or wait until they qualify for ILR after completing an appropriate probationary period of limited leave and access a student loan at that point.

Where a decision is taken to grant ILR to a child because it is considered to be in their best interests, this does not necessarily mean the parents should be granted ILR in line. It will normally be appropriate to grant them a standard period of leave and require them to complete the usual probationary period before being eligible to apply for settlement themselves, unless they can demonstrate exceptional compelling or compassionate factors in their own right that warrant departure from the standard grant of DL under this policy.

In all cases the onus is on the applicant to provide evidence as to why it is in the best interests of the child to be granted a period of leave that is different from the standard period of 30 months' DL. Where a decision maker considers that it is in the best interests of the child or there are exceptional compelling or compassionate reasons to depart from the policy of granting 30 months' DL, the case must be referred to a senior caseworker for consideration.

5.4 Modern Slavery cases (including trafficking)

Where a person qualifies for DL under the criteria relating to personal circumstances, helping police with enquires or pursuing compensation the period of leave to be granted will depend on the individual facts of the case and should normally be sufficient to cover the amount of time it is anticipated they will need to remain in the UK. However, leave should normally be granted for a minimum of 12 months, and normally not more than 30 months (2.5 years). A further period of leave may be granted if required and appropriate. For further details of the duration of leave in modern slavery cases see the Competent Authority guidance.

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Section 6: Curtailing Discretionary Leave

This section sets out the circumstances where consideration must be given to ending (or curtailing) DL.

6.1 Voluntary actions leading to curtailment

It will not usually be appropriate to curtail a person's leave simply because they have returned to their own country or have travelled on their own national passport (those granted DL will normally be expected to keep their own national passport valid). This is because we will not have accepted that the person has a well-founded fear of return to their country and will have been granted DL for reasons other than protection. However, where it comes to light that a person has obtained a national passport following a grant of DL under paragraph 353B, the case must be reviewed.

There may be other occasions where leave should be curtailed because the reasons which led to the grant of DL no longer persist: for example if their medical condition improves.

6.2 Curtailment on grounds of character, conduct, or fraud

DL should normally be curtailed if a person becomes subject to any of the grounds for exclusion in the 'Exclusion under Article 1F of the Refugee Convention' instruction, where there is criminality or where the individual is a danger to national security, eg through extremist behaviours. This will usually apply where a person's actions after the grant of DL bring them within the scope of those grounds. There may also be situations where the Home Office becomes aware that a person is subject to one of the grounds of exclusion after a grant of DL. It will normally be appropriate to curtail leave in such cases and pursue removal or consider whether a grant of leave under the restricted leave policy is appropriate.

DL should normally be curtailed if a person becomes liable to deportation and a deportation order is made, it will have the effect of invalidating any extant leave. Action to curtail or vary leave will only be necessary where a person is liable to deportation but it is not possible to make a deportation order (eg for ECHR Article 3 reasons).

A person who fraudulently obtains leave to enter by deception is an illegal entrant. If it is decided to take illegal entry action against that person (under Schedule 2 to the Immigration Act 1971), any leave previously granted is no longer valid. Where a person has obtained leave to remain by deception under this policy, that person should have their leave curtailed following which they would liable to removal under section 10 of the Immigration and Asylum Act 1999 as amended. See chapter 50 Liability to administrative removal under section 10 (non EEA) Enforcement Instructions and Guidance (EIG).

Separate action to vary DL will be required only where a decision to remove cannot be made or removal directions set (eg for ECHR Article 3 reasons). For example, where it is not

possible to remove a person but it is appropriate, given the circumstances of the case, to vary the amount of DL such that there is a shorter period of leave remaining.

6.3 Other situations where the basis for the grant of leave has ceased

There may be other occasions where due to a change in circumstances it would be appropriate to curtail DL. For example, it would normally be appropriate to curtail leave where a child who was granted leave under the UASC policy and who is still a child is subsequently contacted by an adult family member who can care for them in their own country. It is normally considered to be in the best interests of a child to be reunited with family members in their country of origin.

All such cases must be assessed on a case-by-case basis to ensure that this does not give rise to protection issues, for instance, where the family members are themselves the cause of the child's need for protection. This may arise where domestic servitude, forced labour, trafficking or sexual exploitation are involved in the situation and there is insufficient of protection for the child. The views of children's services and/or those currently caring for the child should be sought so that these can inform consideration of the child's best interests.

A senior caseworker must always be consulted before any action is taken to consider curtailment of leave under this category. Further guidance is given in the Asylum Instruction, 'Processing asylum applications from children'.

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Section 7: Further leave applications

This section applies to those granted an initial period of DL on or after 9 July 2012. See section 10 on Transitional Arrangements for cases where DL was granted before 9 July 2012.

In most cases, a person will not become eligible to apply for settlement until they have completed a continuous period of 120 months' (10 years') limited leave. An individual should apply for further DL on the appropriate application form no more than 28 days before their existing leave expires if they wish to remain in the UK. If they apply after their limited leave has expired their application will be considered out of time.

From 27 June 2015, all applications for further DL, including those from failed asylum seekers, must be made on a specified form and meet the requirements of a valid application under paragraph 34 of the Immigration Rules. They must also be accompanied by the correct fee in line with the requirements of the Immigration and Nationality Fees Regulations, unless applying for a fee waiver under the Fee waiver guidance. See UK Visas and Immigration on gov.UK for the current forms and guidance.

Where a further leave application amounts to a request for an upgrade from DL to refugee leave or HP, caseworkers must refer to the Further Submissions guidance. Protection claims or further submissions following the refusal of asylum must be made in person in Liverpool and cannot be lodged on a postal application form. Caseworkers are able to grant further DL in such cases where the individual qualifies for further leave under this policy but should not consider any protection based submissions. Where a request for an upgrade from limited leave to ILR is received, caseworkers must apply the guidance at section 5.3 above.

A person granted DL before 2 September 2011 to whom the policy on restricted leave applies and who continues to be excluded from asylum and HP should be considered under the restricted leave policy and must not be granted further DL. From January 2015, this also includes those refused protection under Article 33(2) of the Refugee Convention.

7.1 Considering further DL applications

All applications for further DL must be considered in line with this guidance, taking into account all information available at the date of decision, including the contents of the application form, country reports and any other relevant information, including that provided at the time of the original grant of DL. In most cases applications for further DL may be considered and decided without the need for interview, unless the caseworker is not satisfied they have all the necessary information or evidence in order to make an informed decision on the application. However, caseworkers should first write to applicants to request further information before considering whether an interview is necessary.

Out of time applications must still be considered on the basis of all the evidence put forward and the fact that the application was late should not, on its own, be used as a reason to refuse

further leave where the individual otherwise qualifies under the policy. Those who apply out of time will be unable to accrue continuous leave towards settlement.

7.2 Unaccompanied children who have turned 18

Unaccompanied children granted DL in accordance with paragraphs 352ZC to 352ZF of the Immigration Rules who have turned 18 by the time they apply for further leave or whilst a pending application is being considered must be considered in the same way as an adult applying for further leave. They will no longer qualify for further leave as an unaccompanied child but caseworkers must consider whether they qualify under another category before refusing the further application. Those granted DL as an unaccompanied child may also apply on another route if they wish to extend their limited leave.

7.3 Granting further DL

Where an individual meets the requirements for a grant of further DL, they should normally be given leave in accordance with the duration of grants section above (see section 5), even if this means that they become eligible to apply for further leave or settlement before that period of leave expires.

7.4 Refusing further DL

Where an application for further DL is considered and it is decided that the individual no longer qualifies for DL, the application should be refused. There is no automatic right to further leave or settlement and those who apply for further leave must qualify under the policy in force at the time of the decision.

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Section 8: Settlement applications

This section applies to those granted an initial period of limited leave under the DL policy on or after 9 July 2012 and who do not, at the date of decision, fall within the restricted leave policy. See section 10 - Transitional Arrangements for cases where an initial period of DL was granted before 9 July 2012.

A person will normally become eligible to apply for settlement after completing a continuous period of 120 months' (10 years') limited leave. The application will be considered in light of the circumstances prevailing at that time. All settlement applications must be made on the appropriate form no more than 28 days before existing leave expires. Any time spent in prison in connection with a criminal conviction will not count towards the 10 years. However, leave can be aggregated either side of a period of imprisonment providing that the continuous residence requirement is met.

Any leave accrued whilst waiting for a valid application for further leave to be considered, may count towards the required period of leave for settlement, providing the application was made in time and leave was automatically extended in accordance with section 3C(2) of the Immigration Act 1971. See Section 3C and 3D leave for further guidance.

8.1 Considering settlement applications

As with an application for further leave, the application should be considered in accordance with this policy to assess whether they still qualify for DL. Those who have accrued leave under the LOTR policy and later granted DL may be able to have all periods of leave taken into consideration in calculating the leave accrued towards the qualifying period when applying for settlement. This will depend on the individual circumstances, including the reasons for the grant of LOTR.

8.2 Granting settlement

Where a person has held DL for a continuous period of 10 years and continues to qualify for DL under the policy, they should be granted settlement unless there are any criminality or exclusion issues. See Criminality and Exclusion section.

8.3 Further grants of Discretionary Leave

There may be cases where it is clear that the basis for the (continuing) grant of DL is temporary. Settlement should not normally be granted if there is a clear basis for considering that within 12 months the factors giving rise to the grant of DL will cease to apply. A person may not be denied settlement under this section for more than 12 months beyond the normal qualifying period.

8.4 Refusal of Settlement and Further Leave

Where a person no longer qualifies for DL, the application for settlement should be refused and further DL should not be granted.

Section 9: Travel Documents

A person granted DL will normally be expected to keep their own national passport valid or obtain a passport from their country of origin. This is because it has not been accepted that the person has a well-founded fear of return to their own country or of their own authorities and DL has been granted for other reasons.

However, a person who has DL following an unsuccessful asylum claim may apply for a Home Office Certificate of Travel (COT) on the appropriate application form and payment of the correct fee. Applicants must normally provide evidence to show that they have been formally refused a national passport or evidence to demonstrate they have made efforts to obtain a passport which have proved unsuccessful in the absence of a formal refusal from the relevant Embassy. Where the applicant has ILR, the COT will usually be valid for 5 years. Otherwise it will usually expire when the holder's current leave to enter or remain expires.

It should be noted that even if all the criteria are met, an application for a COT can be refused for compelling reasons of national security and public order. Further information about applying for travel documents is available on Gov.UK.

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Section 10: Transitional Arrangements

All decisions made on Discretionary Leave on or after 9 July 2012 will be subject to the criteria set out in this guidance. Where a decision was taken before 9 July 2012 but an appeal is allowed on or after 9 July 2012 on Article 8 family life or private life grounds, staff must refer to IDI CH8 (Family Members transitional cases), except in deportation cases.

Those granted DL before 9 July 2012 may apply to extend that leave when their period of DL expires. All such applications, including settlement applications under the transitional arrangements, must be made on the appropriate application form no more than 28 days before their existing leave expires. Caseworkers must apply the following guidance:

10.1 Applicants granted DL before 9 July 2012

Those granted leave under the DL policy in force before 9 July 2012 will normally continue to be dealt with under that policy through to settlement if they continue to qualify for further leave on the same basis as their original DL was granted (normally they will be eligible to apply for settlement after accruing 6 years' continuous DL (or where appropriate a combination of DL and LOTR, see section 8 above)), unless at the date of decision they fall within the restricted leave policy.

Caseworkers must consider whether the circumstances prevailing at the time of the original grant of leave continue at the date of the decision. If the circumstances remain the same, the individual does not fall within the restricted leave policy and the criminality thresholds do not apply, a further period of 3 years' DL should normally be granted. Caseworkers must consider whether there are any circumstances that may warrant departure from the standard period of leave. See section 5.4.

If there have been significant changes that mean the applicant no longer qualifies for leave under the DL policy or the applicant falls for refusal on the basis of criminality (see criminality and exclusion section above), the further leave application should be refused.

Those granted DL for 6 months because of the refusal or withdrawal of asylum or humanitarian protection on grounds of criminality and who do not fall within the restricted leave policy, must normally wait 10 years before being eligible to apply for settlement. Where an individual has accrued 10 years' lawful residence under the DL policy and applies for settlement, caseworkers must consider Part 9 of the Immigration Rules and, in particular, paragraph 322(1C).

10.2 Validity of further applications

Caseworkers may continue to see applications for further periods of leave made on the HP or DL Form. These should be accepted and considered providing the application was received before 13 December 2012.

From 6 April 2015, all applications for further leave under the DL policy must be made on the FLR(DL) form and are chargeable unless the applicant falls within the scope of the fee waiver policy. For failed asylum seekers (and victims of modern slavery or trafficking) this applies only to further leave applications – the initial grant of leave following refusal of asylum is still processed free of charge. Those who are applying for further leave on the basis of family or private life should use the FLR(FP) form. All applications must meet the conditions in force at the time the application is made.

Applications for further DL must be accompanied by the correct fee in line with the requirements of the Immigration and Nationality Fees Regulations and Fee waiver guidance for FLR(FP) and FLR(O). See Gov.UK for the current forms and guidance.

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Document Control

Version	Author(s)	Date	Change References
6.0	OPRU	June 2013	Update to comply with the judgment in SM and Others
7.0	IBPD	18 August 2015	Updated to reflect introduction of charging for failed asylum seekers granted DL. Re-branded in line with Home Office guidelines.

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